86-576

No. ____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM SHOEMAKER, ANGEL CORDERO, JR., WILLIAM HERBERT MCCAULEY, PHILIP GROVE, and VINCENT BRACCIALE,

Petitioners,

—v.—

HAL HANDEL, Executive Director of the New Jersey Racing Commission, SAMUEL A. BOULMETIS, Steward Representing New Jersey Racing Commission, JOSEPH F. PIARULLI, Associate Steward, CARL H. HANFORD, Associate Steward, and RICHARD W. LAWRENSON, Associate Steward,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Can an individual, other than a prison inmate, be required to submit to urine and breathalyzer tests without any reasonable suspicion that he has violated some statute or regulation?

2. Should an individual be required to surrender his privacy merely because the State believes that random urine and breathalyzer tests would improve the "public perception" of the integrity of racing?

3. Can those few cases approving warrantless administrative inspections of *commercial property* in certain pervasively regulated industries, for the purpose of implementing a statutory scheme of regulation, be extended to the random, warrantless testing of the bodily fluids of an individual without any suspicion that he has violated some statute or regulation, particularly when the State cannot demonstrate any relationship between the condition being tested for and the public's safety or health?

LIST OF PARTIES

The only parties to the proceedings below were the petitioners and respondents named in the caption to this petition. However, Mr. Bracciale's name was misspelled below as Bracciole, and the spelling has been corrected in the caption of this petition.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	7
REASONS FOR GRANTING THE WRIT	11
I. THE DECISION BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS	12
A. Conflicting Decisions of this Court	12
B. Conflicting Decisions of Other Circuit Courts of Appeals	15
C. The Nature of the Conflicts	18
II. THE BASES OF THE THIRD CIRCUIT'S DECISION ARE FUNDAMENTALLY FLAWED	20
A. Constitutional Protections Cannot Properly Be Measured by Reference to the "Public's Perception"	20

PAGE

B. The Exception to the Warrant Requirement for Inspections of Pervasively Regulated Industries Is Not Applicable to Searches of Individuals 23

III. THIS CASE WOULD GIVE THE SUPREME COURT THE OPPORTUNITY TO GUIDE THE LOWER COURTS WITH RESPECT TO WARRANTLESS URINE AND BREATHALYZER TESTS BY EXTENDING EXISTING DOCTRINES INTO THIS AREA 27

A. A National Controversy Exists over the Adminstration of Drug and Alcohol Tests 27

B. The Reasonable Suspicion Standard Should Apply Absent a Direct and Immediate Threat to the Safety or Health of the Public at Large 28

CONCLUSION 30

APPENDIX

Opinion of the Court of Appeals 1a

Opinion of the District Court After Trial 19a

Opinion of the District Court on Motion For Preliminary Injunction 59a

Judgment of the Court of Appeals 84a

TABLE OF AUTHORITIES

Cases: PAGE

Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985) 13, 30

Bell v. Wolfish, 441 U.S. 520 (1979) 11, 16, 27

Camara v. Municipal Court, 387 U.S. 523 (1967) 24, 28

Capua v. City of Plainfield, No. 86-2992 (D.N.J. Sept. 18, 1986) 29

Caruso v. Ward, N.Y.L.J., Aug. 29, 1986 at 11, Col. 2 (Sup. Ct., N.Y. Co. July 1, 1986) 29

City of Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985) 28

Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) 24

Delaware v. Prouse, 440 U.S. 648 (1979) ..... *passim*

Division 241, Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264 (7th Cir.), *cert. denied* 429 U.S. 1029 (1976) 18, 30

Donovan v. Dewey, 452 U.S. 594 (1981) 24, 25

Frank v. Maryland, 359 U.S. 360 (1959) 24, 28

Hunter v. Auger, 672 F.2d 668 (8th Cir. 1982) ..... *passim*

Ker v. California, 374 U.S. 23 (1963) 13

Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) 24

McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985) 7, 28

New Jersey v. T.L.O., 469 U.S. 325 (1985) ..... *passim*

Patchogue-Medford Congress of Teachers v. Board of Education, N.Y.L.J., Aug. 12, 1986, at 3, col. 1 (N.Y. App. Div., 2d Dep't Aug. 11, 1986) 29

PAGE

Schmerber v. California, 384 U.S. 757 (1966) 13, 24, 25

Security and Law Enforcement Employees v. Carey, 737 F.2d 187 (2d Cir. 1984) ..... *passim*

See v. City of Seattle, 387 U.S. 541 (1967) 24

Seelig v. McMickens, N.Y.L.J. Aug. 7, 1986 at 7, col. 1 (Sup. Ct. N.Y. Co. Aug. 5, 1986) 29

Shoemaker v. Handel, 619 F. Supp. 1089 (D.N.J. 1985) 21

Shoemaker v. Handel, 795 F.2d 1136 (3d Cir. 1986) ... *passim*

Storms v. Coughlin, 600 F. Supp. 1214 (S.D.N.Y. 1984) 11, 13

Terry v. Ohio, 392 U.S. 1 (1968) 14

Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. App. 1985) 28

United States v. Biswell, 406 U.S. 311 (1972) 24

United States v. Brignoni-Ponce, 422 U.S. 873 (1975) .. 28

Ybarra v. Illinois, 444 U.S. 85 (1979) 21

U.S. Constitution:

Amendment IV ..... *passim*

Amendment XIV 13, 22, 23

New Jersey Statutes:

N.J. Stat. Ann. § 5:5-30 (West 1973) 25

N.J. Stat. Ann. § 5:5-33 (West Supp. 1985) 25

New Jersey Regulations:

N.J. Admin. Code tit. 13, § 70-14A.10 (1985) ..... *passim*

N.J. Admin. Code tit. 13, § 70-14A.11 (1985) ..... *passim*

N.J. Admin. Code tit. 13, § 70-31.3 (1982) ..... *passim*

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WILLIAM SHOEMAKER, ANGEL CORDERO, JR., WILLIAM HERBERT MCCAULEY, PHILIP GROVE, and VINCENT BRACCIALE,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

William Shoemaker, Angel Cordero, Jr., William Herbert McCauley, Philip Grove, and Vincent Bracciale respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on July 10, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 795 F.2d 1136 (3d Cir. 1986), and is reprinted in the appendix hereto, p. 1a, *infra*.

The opinion of the United States District Court for the District of New Jersey (Brotman, D.J.) is reported at 619 F. Supp. 1089 (D.N.J. 1985), and is reprinted in the appendix hereto, p. 11a, *infra*.

The opinion of the United States District Court for the District of New Jersey denying the plaintiffs' motion for a preliminary injunction is reported at 608 F.Supp. 1151 (D.N.J. 1985), and is reprinted in the appendix hereto, p. 21a, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was dated and entered on July 10, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

U.S. Const. amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

N.J. Stat. Ann. (§ 5:5-30 West 1973).

The commission shall have full power to prescribe rules, regulations and conditions under which all horse races shall be conducted in the State of New Jersey under the provisions of

this act, and may alter, amend, repeal and publish the same from time to time.

Every permit issued under this act shall contain a condition that all running races or race meetings conducted thereunder shall be subject to the reasonable rules and regulations from time to time prescribed by the Jockey Club, a corporation organized under the laws of the State of New York; that all steeplechase races, or steeplechases shall be subject to the reasonable rules and regulations from time to time prescribed by the National Steeplechase and Hunt Association, a corporation organized under the laws of the State of New York; that all harness races shall be subject to the reasonable rules and regulations from time to time prescribed by the United States Trotting Association organized under the laws of the State of Ohio. Any rule or regulation of such Jockey Club, National Steeplechase and Hunt Association or United States Trotting Association may be modified or abrogated by the said racing commission, upon giving such Jockey Club, National Steeplechase and Hunt Association or United States Trotting Association an opportunity to be heard.

N.J. Stat. Ann.* § *5:5-33 (West Supp. 1985).

All parimutuel employees and all horse owners, riders, agents, trainers, starters, timers, judges, grooms, drivers, and others, acting in any capacity in connection with the training of the horses or the actual running of the races in any such race meeting may be licensed by the commission, pursuant to such rules and regulations as the commission may adopt. The commission shall have full power to prescribe rules, regulations and conditions under which all such licenses are issued in the State of New Jersey and to revoke or refuse to issue a license if in the opinion of the commission the revocation or refusal to issue such license is in the public interest; provided, however, that such rules, regulations and conditions shall be uniform in their application; and further provided, that no fee shall be in excess of $50.00 for each license so granted.

N.J. Admin. Code tit. 13, § 70-14A.10 (1985).

Officials, jockeys, trainers and grooms shall, when directed by the State Steward, submit to a breathalyzer test and if the results thereof show a reading of more than .05 percent of alcohol in the blood, such person shall not be permitted to continue his duties. The stewards may fine or suspend any participant who records a blood alcohol reading of .05 percent or more. Any participant who records a reading above the prescribed level on more than one occasion shall be subject to expulsion, or such penalty as the stewards may deem appropriate.

Admin. Code tit. 13, § 70-14A.11 (1985).

(a) No licensee or official shall use any Controlled Dangerous Substance as defined in the "New Jersey Controlled Dangerous Substance Act", N.J.S.A. 24:21-1, *et seq.* or any prescription legend drug, unless such substance was obtained directly, or pursuant to a valid prescription or order from a licensed physician, while acting in the course of his professional practice. It shall be the responsibility of the official, jockey, trainer and groom to give notice to the State Steward that he is using a Controlled Dangerous Substance or prescription legend drug pursuant to a valid prescription or order from a licensed practitioner when requested.

(b) Every official, jockey, trainer and groom for any race at any licensed racetrack may be subjected to a urine test, or other non-invasive fluid test at the direction of the State Steward in a manner prescribed by the New Jersey Racing Commission. Any official, jockey, trainer or groom who fails to submit to a urine test when requested to do so by the State Steward shall be liable to the penalties provided in N.J.A.C. 13:70-31.

(c) Any official, jockey, trainer and groom who is requested to submit to a urine test shall provide the urine sample, without undue delay, to a chemical inspector of the Commission. The sample so taken shall be immediately sealed and

tagged on the form provided by the Commission and the evidence of such sealing shall be indicated by the signature of the tested official, jockey, trainer or groom. The portion of the form which is provided to the laboratory for analysis shall not identify the individual, official, jockey, trainer or groom by name. It shall be the obligation of the official, jockey, trainer or groom to cooperate fully with the Chemical Inspector in obtaining any sample which may be required to witness the securing of such sample.

(d) A "positive" Controlled Dangerous Substance or prescription drug result shall be reported, in writing, to the Executive Director or his designee. On receiving written notice from the official chemist that a specimen has been found "positive" for controlled dangerous substances or prescription legend drug, the Executive Director or his designee shall proceed as follows:

1. He shall, as quickly as possible, notify the official, jockey, trainer and groom involved in writing.

2. For an official, jockey, trainer or groom's first violation, he shall issue a written reprimand and warning and notify the official, jockey, trainer or groom that he will be subject to mandatory drug testing and that any further violation shall result in the sanctions described in paragraphs (3) and (4) below:

3. For an official, jockey, trainer or groom's second violation, he shall require the official, jockey, trainer or groom to enroll in a Supervisory Treatment Program approved by the New Jersey Racing Commission upon such reasonable terms and conditions as he may require. The official, jockey, trainer or groom shall be permitted to participate unless his continued participation shall be deemed, by the Executive Director or his designee, to be detrimental to the best interests of racing. It shall be the official, jockey, trainer or groom's responsibility to provide the Commission with written notice of his enrollment, weekly status reports and written notice that he has

successfully completed the program and has been discharged. If an official, jockey, trainer or groom fails to comply with these requirements, he shall be liable to the penalties provided in N.J.A.C. 13:70-31.

4. For official, jockey, trainer or groom's third or subsequent violation, he shall be liable to the penalties provided in Subchapter 31 and may only enroll into a Supervisory Treatment Program in lieu of said penalties, with the approval of the New Jersey Racing Commission.

(e) Any information received in the process of obtaining a urine sample, including but not limited to medical information, the results of any urine test, and any reports filed as a result of attending a Supervisory Treatment Program shall be treated as confidential, except for their use with respect to a ruling issued pursuant to this rule, or any administrative or judicial hearing with regard to such a ruling. Access to the information received and/or reports of any positive results and/or reports from a Supervisory Treatment Program shall be limited to the Commissioners of the New Jersey Racing Commission, the Executive Director and/or his designee, Counsel to the Racing Commission and the subject, except in the instance of a contested matter. In the instance of a contested matter, any information received and reports prepared shall not be disclosed without the approval of the Executive Director or his designee.

(f) Information received and reports prepared pursuant to this rule shall be stored in a locked secure area in the office of the Executive Director for a period of one year, after which time, they shall be destroyed. However, the Commission may maintain the information received and reports on individuals who have violated this rule for the purpose of recording the number of violations and the results of supervisory treatment, and for use should future violations occur.

STATEMENT OF THE CASE

Petitioners are five journeymen jockeys who ride thoroughbred horses for their owners in flat races, upon which parimutuel betting is normally permitted. The races are conducted during scheduled race meetings at tracks owned and operated by racing associations throughout the country. The petitioners are among the most experienced jockeys in the country.

In April 1985, petitioners brought an action in the United States District Court for the District of New Jersey, to enjoin the application of certain regulations which had been adopted by the New Jersey Racing Commission ("NJRC"), and which became effective on April 1, 1985. The jurisdiction of the district court was invoked under the Civil Rights Act, 42 U.S.C. § 1981 *et seq.*, and under 28 U.S.C. §§ 1331, 1343, upon the grounds that the imposition of the said regulations by the state racing officials violated the petitioners' rights under the Fourth, Ninth and Fourteenth Amendments to the United States Constitution.

All of the petitioners named herein are members of Jockeys' Guild, Inc. (the "Guild"), a social welfare organization whose membership includes the vast majority of the professional jockeys riding in thoroughbred, appaloosa and quarter-horse races in the United States. The Guild has been active for several years in detecting and rehabilitating those few jockeys who have drug and alcohol problems, and was instrumental in having the National Association of State Racing Commissioners adopt a uniform rule for testing for drug and alcohol abuse, based on reasonable cause.

The regulations which are the subject of this proceeding are not the uniform rule. The first regulation provides that every official, jockey, trainer, and groom for any race may be subjected to a urine test for the detection of use of "Controlled Dangerous Substance[s]", and may be subjected to sanctions for failure to submit to such test and for positive results in such a test.[1] A second regulation requires that officials, jock-

1. When the urinalysis regulation was first adopted, it applied only to jockeys. It was subsequently amended to include the individuals within the

eys, trainers and grooms shall, when directed by the State Steward, submit to breathalyzer tests for the detection of alcohol.

As the two regulations are written, they allow the state racing officials to exercise absolute and unfettered discretion to select jockeys to be tested, without any limitation or objective criteria whatsoever. In practice, the regulations are implemented in a markedly different manner.

The breathalyzer test is administered to every jockey, every day, upon his or her arrival at the track. (*See Trial Transcript*, Garland at 44.)[2] Although the language providing for testing officials, trainers and grooms is exactly the same, they are tested infrequently, or not at all. (*Tr.*, McCauley at 79-80; Grove at 106.)

To implement the urine testing, with respect to jockeys, one of the respondents selects one of the eight or nine races on a day or evening program, places the names of the jockeys (usually six to nine in number) in a hat, and picks out three names; the jockeys whose names are picked are then required to provide a urine sample after the race. (*Tr.*, Garland at 42.) Under the current practice, if a jockey's name is picked more than three times in a seven-day period, he is excused from providing another sample. (*Tr.*, Boulmetis at 11.) A jockey is also excused if his reducing regimen makes it impossible for him to urinate when called upon to do so. (*Tr.*, Boulmetis at 10-11.) However, the respondents expressly reserved the right to designate additional jockeys for testing in their absolute discretion, notwithstanding the practice of selection by lot which is presently utilized. (*Tr.*, Garland at 53; Boulmetis at 25.)

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additional categories stated above, after petitioners brought this action contending, *inter alia*, that the regulation violated the equal protection clause of the Fourteenth Amendment.

2. References to the trial transcript will be cited hereinafter as "*Tr.*, ____".

At the trial, respondents offered no direct evidence on alcohol or drug use by jockeys,[3] and they made no attempt to show that either track safety or the "integrity of racing" has ever suffered any adverse impact as a result of drug or alcohol use or abuse on the part of jockeys. (*See Trial Transcript, passim.*) Indeed, Respondent Boulmetis and Bruce Garland, Deputy Director of the NJRC, each admitted that he had not seen even one jockey impaired by either alcohol or drugs during the year preceding the imposition of the regulations. (*Tr.* Boulmetis at 20-22; Garland at 75.)

The only evidence that was offered on that point came from the petitioners themselves, when they testified that in the course of their entire careers, which ranged from 9 to 18 years and covered thousands of races in each instance, they had observed jockeys in the dressing room who were impaired by alcohol on no more than six occasions.[4] In each such instance, the individual who was impaired did not ride; he either voluntarily withdrew from his mounts at the suggestion of the other jockeys, or was taken off involuntarily by the stewards or the track physician, after being referred to those officials by the other jockeys. (*Tr.*, Grove at 83; Giovanni at 187-88; Black at 118.) The petitioners also testified that they would not go out to ride in a race with another jockey who was impaired, because of the increased danger; it is because of that danger that impaired jockeys are reported by their fellow workers,

3. A number of the expert witnesses stated, in response to questions from the respondents' counsel, that they had "no reason to believe" that drug use among jockeys was any different from the 10 to 20% figure that was assumed for the general population. However, none of those witnesses had any affirmative, actual evidence of drug use by even one jockey.

4. Petitioner Bracciale testified that he had seen five or six jockeys in impaired condition, over the course of 15 years (*Tr.*, Bracciale at 12); petitioner Grove had seen three in the course of 18 years (*Tr.*, Grove at 82, 85); another jockey (Anthony Black) saw "three or four" in the course of 15 years (*Tr.*, Black at 107, 109) and petitioner McCauley could not recall seeing any over the course of 9 years (*Tr.*, McCauley, at 53, 66). Although respondent Boulmetis asserted that he had seen and ridden with several impaired jockeys in the course of his own career as a jockey, a number of years ago, he failed to provide any details to substantiate his claim. (*Tr.*, Boulmetis at 19-20.)

who have the greatest interest in their own safety. (*Tr.*, Bracciale at 17; Grove at 100.)

The vast majority of accidents and injuries in racing—probably more than 90%—are caused by injuries to the horse which result in a breakdown. (*Tr.*, Bracciale at 17; Grove at 93.) There is no evidence to connect even a single racing accident with drug use by a jockey, and only one, which occurred in Pennsylvania, is thought to have been related to a jockey's use of alcohol. (*Tr.*, Giovanni at 181.)

The respondents have admitted that the urinalysis test for drugs has no impact on track safety. It is administered *after* the race is run, and then sent out to a laboratory for evaluation. In most cases, the results are not even available until the following day. (*Tr.*, Garland at 89.)

The petitioners testified they considered the daily breathalyzer test to be embarrassing, and the urine test to be both humiliating and degrading. (*Tr.*, Bracciale at 13; Black at 111-12, 123-24.) They explained that a jockey's work season typically lasts 330-360 days per year, and because of the weight limitations to which all jockeys are subject, they must take special care of their bodies by restricting their diet and otherwise. (*Tr.*, Bracciale at 19, 20.) They also testified that they each have striven over the years to achieve a "good reputation" at the racetrack, which includes, *inter alia*, a reputation for remaining in peak racing condition at all times. (*Tr.*, Bracciale at 13; McCauley at 57-58.)

Viewed against this background, petitioners regard the sudden imposition of requirements for mandatory drug and alcohol tests, without any basis for suggesting that they or any of their fellow jockeys were involved in the abuse of either, as an insult to their integrity as well as a substantial violation of their privacy. (*Tr.*, Grove at 104; Black at 111-12.) The petitioners also testified that the administration of the tests caused them to suffer embarrassment at the hands of their friends and relatives, because of the common association of such tests with evidence or suspicion of the commission of a crime, in the minds of the public. (*Tr.*, Grove at 86-87.)

In the three months between the commencement of the testing program and the time of trial only one jockey tested positive for alcohol, and only one tested positive for a drug, which was cocaine. (*Tr.*, Garland, at 57-58.)[5]

In the course of the proceedings below, the district court first denied the petitioners' motion for a preliminary injunction and then, after conducting a bench trial, held in favor of the respondents and dismissed the complaint, primarily upon the ground that thoroughbred racing is a highly regulated industry, and that warrantless searches of the person, even in the absence of any suspicion of wrongdoing, are constitutionally permissible. The Third Circuit Court of Appeals affirmed, holding that the State's interest in maintaining the public perception of the integrity of racing outweighed any constitutional interest in privacy which the jockeys might have.

REASONS FOR GRANTING THE WRIT

Summary

In the midst of its opinion in this case, the Third Circuit Court of Appeals crystallized the key issue in this petition when it observed:

> "It is the public's perception, not the known suspicion, that triggers the state's strong interest in conducting warrantless testing."

Shoemaker v. Handel, 795 F.2d 1139, 1142 (3d Cir. 1986). With these words, the Third Circuit swept aside traditional concepts of Fourth Amendment analysis and held, for the first time anywhere in a case involving persons other than prison inmates,[6] that state officials were entitled to conduct warrantless

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5. During the same period, four racing officials tested positive for alcohol. (*Tr.*, Garland at 58.)

6. In *Storms v. Coughlin*, 600 F.Supp. 1214 (S.D.N.Y. 1984), the Court upheld a program of random drug testing of prison inmates, relying on this Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979). In doing so, however, the district court reiterated the peculiar security concerns which were recited by this Court in *Bell*, and which make prison inmate cases *sui generis*.

searches of an individual's bodily fluids on a random basis, without so much as a reasonable suspicion that *any* of the individuals being searched had violated any law or rule.

In so holding, the Third Circuit placed itself in substantial conflict with decisions of this Court concerning the standards applicable to searches and seizures of the person in a non-criminal setting, including *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) and *Delaware v. Prouse*, 440 U.S. 648 (1979), and with decisions of the Courts of Appeals for the Second and Eighth Circuits in *Security and Law Enforcement Employees v. Carey*, 737 F.2d 187 (2d Cir. 1984) and *Hunter v. Auger*, 672 F.2d 668 (8th Cir. 1982).

Furthermore, by adopting a "public perception" standard for justifying the conduct of state officials, as it affects the constitutional rights of individuals, the Third Circuit has formulated a precedent that is both extremely dangerous in concept and unworkable in practice, and must therefore be rejected by this Court. Finally, petitioners submit that because this case concerns the proper standard for administering drug and alcohol tests in the work environment, which is an issue that has become a topic of national debate and generated a storm of litigation and controversy, it offers a timely opportunity for this Court to provide the necessary constitutional background and guidelines to the lower courts which are now considering the issue, as well as the legislators, regulators and employers who are presently contemplating or instituting similar programs.

I. THE DECISION BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEALS

A. Conflicting Decisions of this Court

There is no decision of this Court which concerns the standard applicable to the administration of drug or alcohol tests by state officials in an environment controlled by them. However, in *New Jersey v. T.L.O.*, *supra*, this Court considered and determined the appropriate standard for a search of

the person in a non-criminal setting.[7] There, the Court was required to determine the validity of a search of a student's purse by an assistant principal of a high school, after the student denied a charge made by a teacher that she had been found smoking in the bathroom in violation of school rules. The New Jersey Supreme Court had held that the search was unreasonable under the Fourth Amendment.

When the case came before this Court on a writ of *certiorari*, the State of New Jersey argued, just as it has in the lower courts in the instant case, that the Fourth Amendment did not apply because (a) the search was not made by law enforcement officers seeking evidence of a crime, and (b) as a result of the "pervasive supervision" which school officials exercise over the children in their care, students have "no legitimate expectation of privacy in articles of personal property 'unnecessarily' carried into a school." 469 U.S. at 338-39.

This Court, in its opinion, expressly recognized the state's "substantial interest" in maintaining discipline, order and a sound educational environment in its schools, and the increasing difficulties which student drug use has created in accomplishing that objective. Nevertheless, the Court rejected *both* of the State's contentions and held that (i) the Fourth Amendment *does* apply to searches conducted by state officials other than law enforcement officers, including teachers, and (ii) students *do* retain a constitutionally recognizable expectation of privacy in their persons or property, notwithstanding the "pervasive supervision" to which they are subjected.

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7. The respondents have not disputed in the courts below that the urinalysis and breathalyzer tests that are at issue here are "searches" and "seizures" of the person being tested. The courts which have considered the question have all come to the same conclusion, primarily by reference to this Court's analysis in *Schmerber v. California*, 384 U.S. 757 (1966). *See, e.g., Division 241, Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976) (urinalysis and blood alcohol tests assumed to be, and dealt with as, searches within the Fourth Amendment); *McDonell v. Hunter*, 612 F. Supp. 1122 (S.D. Iowa 1985); *Allen v. City of Marietta*, 601 F. Supp. 482, 488-99 (N.D. Ga. 1985); *Storms v. Coughlin*, *supra*, 600 F. Supp. at 1218. As these cases also recognized, the Fourth Amendment is enforceable against the states under the due process clause of the Fourteenth Amendment. *Ker v. California*, 374 U.S. 23 (1963).

To strike the proper balance between the privacy interests of the students and the governmental interest of maintaining order in the schools, the Court looked to its prior decision in *Terry v. Ohio*, 392 U.S. 1 (1968) and observed:

> "Determining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the . . . action was justified at its inception,' *Terry v. Ohio*, 392 U.S. at 20; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place,' *ibid.*"

469 U.S. at 341.

Then, applying the *Terry* test to the search that was before it, the Court held:

> "[A] search of a student by a teacher or other school official will be 'justified at its inception' *when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.*"

Id. at 341-42 (emphasis added, footnotes omitted). The Court went on to state that the application of the "reasonable suspicion" test would provide the school officials with sufficient latitude to accomplish their safety and security objectives, and at the same time prevent "unrestrained intrusions" upon the privacy of the students. *Id.*[8]

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8. Although only five justices joined in the Court's opinion upholding the particular search involved in *New Jersey v. T.L.O.*, the Court was unanimous in requiring at least reasonable grounds for suspicion in order to conduct a search of the person. Two of the concurring Justices opined that reasonable suspicion was sufficient only because of the special characteristics present in a school setting. 469 U.S. at 348-50 (Powell, J., joined by O'Connor, J., concurring). Another Justice stated that reasonable suspicion was sufficient only in the presence of a "special need for flexibility justifying a departure from the balance struck by the Framers", which was satisfied by the school's need to maintain order and discipline among its students. *Id.* at 352-353 (Blackmun, J., concurring). Justices Brennan and Marshall, on the other hand, would have held that reasonable suspicion was *never* sufficient for a search of the person, and would have permitted a warrantless search only upon a showing of probable cause. *Id.* at 357-58 (Brennan J., joined by

Similarly, in *Delaware v. Prouse*, *supra*, this Court invalidated the practice of making random stops of automobiles on the highway to check for violations of license, registration and insurance regulations, and held that stops of individual cars—which constitute "seizures" under the Fourth Amendment—could be made only where "there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered, or that either the vehicle or an occupant is otherwise subject to seizure for violation of law . . ." 440 U.S. at 663.

In so doing, the Court rejected the contentions that such discretionary stops were reasonable because (a) they were necessary to accomplish the State's objective of promoting safety on its highways, and (b) automobile owners had diminished expectations of privacy, since the State's regulations affecting the use of automobiles necessarily involved numerous instances of police-citizen contact. The Court acknowledged that the state had a "vital interest" in ensuring the safety of its highways, but held that because there was no showing that random stops were successful in detecting violations, or would make more than a marginal contribution to highway safety, the stops were not sufficiently related to the accomplishment of the state's interest to justify the substantial intrusion upon privacy which a random stop of an automobile travelling on a street or highway would entail. *Id.* at 659-63.

B. Conflicting Decisions of Other Circuit Courts of Appeals

In *Security and Law Enforcement Employees v. Carey*, 737 F.2d 187 (2d Cir. 1984),[9] the Second Circuit Court of Appeals

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Marshall, J., concurring in part and dissenting in part). Finally, Justice Stevens would have permitted a warrantless search only upon reasonable suspicion that the student was violating the law or engaging in conduct that was seriously disruptive of school order and discipline. *Id.* at 376-77 (Stevens, J., joined by Marshall, J., and joined by Brennan, J., as to Part I, concurring in part and dissenting in part). There was *no* suggestion in any of the opinions that were filed in *T.L.O.* that a search of the person could be conducted on the basis of anything less than reasonable suspicion.

9. In the interest of brevity, this case will be referred to hereinafter as *Security Employees v. Carey*, or simply *Security Employees*.

was required to determine the appropriate standard for conducting searches of individuals in an administrative and employment context. At issue in that case were the policies and practices of the New York Department of Correctional Services in conducting searches of prison guards employed by it, in an effort to discover and deter the introduction of contraband into its prisons by prison employees.

In evaluating the validity of the searches, the Second Circuit cited, and quoted from, this Court's opinion in *Bell v. Wolfish*, 441 U.S. 520, 559 (1979), and applied the balancing test required thereby. Thus, the appellate court considered the guards' legitimate expectation of privacy, and even though each of them had received a booklet upon commencing his employment which specifically stated that they were subject to search at any time on prison grounds and to penalties if they refused to comply, it found that the guards still retained an expectation "that they will be free from excessive and unwarranted intrusions based upon unrestrained, standardless exercises of authority by prison administrators." 737 F.2d at 202.

The Second Circuit then examined, just as this Court had in *Prouse*, the alleged justification for the searches, which was said by the State to be "the penological imperatives of maintaining prison security and preserving internal order and discipline." *Id.* The court recognized that objective as a "legitimate governmental interest", *id.* at 203, and that experience had shown that the introduction of contraband posed a substantial danger thereto. Nevertheless, it held that a "reasonable suspicion standard should govern strip searches of correction officers working in correctional facilities," *id.* at 204, and required further that the suspicion be reasonably directed *at a particular person*. *Id.* at 205. Moreover, with regard to the more extensive "strip frisk search" (which involved a visual inspection of an individual's body cavities), the Court held that because there was *no showing* that searches of that type were reasonably related to accomplishment of the state's objective, in that there was no evidence in the record to suggest that contraband *would be found* in the body cavities of a guard, those searches were *not reasonably related* to accomplishment of the government objective. Accordingly, the Court held that strip frisk searches

could not be conducted without a search warrant issued by a judicial officer, on the basis of probable cause. *Id.* at 208.

Finally, the Second Circuit concluded that the *random searches* of prison guards who were not suspected of any violation—which were conducted together with the searches of persons suspected of passing contraband in order to avoid alerting them to the fact that they were under suspicion—were *inherently unreasonable* under the Fourth Amendment. In the Court's words:

> "Random searches of correction officers are violative of the fourth amendment's mandate against unreasonable searches, and *because correction officials know that, in these instances, there are no bases for any suspicions, such searches severely trammel the legitimate expectations of privacy of correction officers.*"

737 F.2d at 210 (emphasis added).

In *Hunter v. Auger*, 672 F.2d 668 (8th Cir. 1982), the Eighth Circuit Court of Appeals held that the "reasonable suspicion standard" also applied to strip searches of prison visitors. That court too recognized that "[t]he penal environment is fraught with serious security dangers" which are magnified by the introduction of contraband. 672 F.2d at 674. Nevertheless, the court observed that "prison officials are not unlimited in ferreting out contraband." Accordingly, it held that:

> "[T]he Constitution mandates that a reasonable suspicion standard govern strip searches of visitors to penal institutions. We believe that this standard is flexible enough to afford the full measure of fourth amendment protection without posing an insuperable barrier to the exercise of all search and seizure powers."

Id. at 674 (citations omitted). The Eighth Circuit held further that in order for a warrantless search to be upheld under the reasonable suspicion standard, the suspicion must be "specifically directed to the person who is targeted for the strip search" *and* the officials conducting the search must have "*reasonable cause to believe* that drugs or other contraband

are concealed in the particular place they decide to search." *Id.* at 675 (emphasis added).[10]

C. The Nature of the Conflicts

Petitioners respectfully submit that the factual parallels between the instant case on the one hand, and *T.L.O.*, *Prouse*, *Security Employees* and *Hunter* on the other, are obvious, and that the conflicts in the legal conclusions between the Third Circuit's decision in *Shoemaker* and those decisions are equally apparent.

In each case, a search or seizure was performed by a state official seeking to enforce the state's regulations. The justification offered for the intrusion into the privacy of the individuals subjected to the searches and seizures was also the same—*i.e.*, that (a) the freedom to conduct a search or seizure without a warrant was "necessary" to accomplish the goal of enforcing the state's regulations and (b) the individuals who were subjected to the exercise of official authority had little or no expectation of privacy, with regard to the subject of the search, due to the existence of state regulations which governed their conduct in some respects.

In *T.L.O.* and *Prouse*, this Court held that the State's interest in carrying out a regulatory or supervisory scheme—

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10. The Third Circuit's decision in *Shoemaker* also conflicts, in principle at least, with that of the Seventh Circuit Court of Appeals in *Division 241, Amalgamated Transit Union v. Suscy*, *supra*. Petitioners disagree with the statement contained in *Suscy* that the bus drivers involved there had "no expectation of privacy" under the Fourth Amendment. However, petitioners believe that the statement can be explained, and justified on a constitutional basis, by reference to the context in which it was made, because when either of the conditions precedent to the drug and alcohol testing program at issue was met (i.e., involvement in an accident or concurrence by two supervisors that an individual appeared to be impaired), there would be sufficient grounds for reasonable suspicion to outweigh any expectation of privacy which a particular bus driver being tested may have had. It was only in that context, and on the basis of those conditions, that the Seventh Circuit held the testing program that was involved in *Suscy* to be reasonable. As noted above, there are *no* such limitations or conditions upon the random, and therefore baseless, testing program that was approved by the Third Circuit in the instant case.

even one so substantial as maintaining order in the public schools or ensuring the safety of the highways—was not sufficient justification, in and of itself, for conducting a search or seizure of individuals who are subject to its jurisdiction. In *Security Employees* and *Hunter*, the Second and Eighth Circuits held that the same principle applied, with respect to the State's interest in maintaining the security of its prisons. In all four of those cases, the Courts held that the individuals retained a substantial interest in privacy, notwithstanding their submission to the State's authority, and accordingly, that a search or seizure could only be justified when the official performing the task had *reasonable grounds to suspect* that the individual being searched or detained had violated the law, or at least an applicable state rule.

Moreover, in *Security Employees* and *Hunter*, the Second and Eighth Circuits specifically addressed the issues that were left open by this Court in *T.L.O.* and *Prouse*, and held that in order to satisfy the reasonable suspicion standard for a search of the person, the suspicion must be specifically directed at the target of the search *and* there must be reasonable cause to believe that the items or condition which the search seeks to identify will be found in the place that is searched. Finally, in *Security Employees* the Second Circuit specifically condemned the concept of random searches of individuals as inherently unreasonable under the Fourth Amendment.

In *Shoemaker*, by contrast, the Third Circuit did not even consider what justification there was for conducting drug and alcohol tests on jockeys in the first place. If it had, the inquiry would have stopped right there, because there never has been a showing, by the respondents or anyone else, that (a) there is any significant amount of drug or alcohol abuse among jockeys, or (b) that such drug or alcohol use as may exist has ever had any impact upon track safety or the integrity of racing.[11] In the absence of such a showing, at the very least, there is and can be no justification for conducting random searches of jockeys.

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11. In fact, the evidence offered at trial demonstrated that not only was there a lack of such abuse by jockeys but also that in the past 10 years there was only one track accident linked to alcohol, and none to drug abuse.

The Third Circuit also did not require any element of suspicion to be directed at *any* of the targets of the search before allowing the drug and alcohol tests to go forward. To the contrary, the Third Circuit specifically rejected that standard when it held, as noted above, that "it is the public's perception, *not the known suspicion*, that triggers the state's strong interest in conducting warrantless testing." 795 F.2d at 1142 (emphasis added).

When it held that a program of testing, and particularly random testing, could be justified by reference to the "public's perception," as opposed to the "known suspicion" of the condition which the tests are designed to identify, the Third Circuit embarked upon a radical departure from the reasoning employed by this Court in *T.L.O.*, *Prouse* and other cases involving the validity of various types of searches under the Fourth Amendment. Petitioners respectfully submit that anything less than the "reasonable suspicion" standard enunciated by this Court, and followed by the Second and Eighth Circuits in *Security Employees* and *Hunter*, is clearly unconstitutional in the context of searches of individuals, and that the conflict between the "reasonable suspicion" test and the "public perception" guideline utilized by the Third Circuit is so great that the latter cannot be allowed to stand.

II. THE BASES OF THE THIRD CIRCUIT'S DECISION ARE FUNDAMENTALLY FLAWED

A. Constitutional Protections Cannot Properly Be Measured by Reference to the "Public's Perception"

The mere suggestion that a group of individuals can be denied the protection of the Constitution on the basis of the public's perception of them is extraordinarily dangerous. Within our own lifetimes, we have seen too many situations, both here and abroad, where groups have suffered frightful hardships because governments bowed to the public perception of them.[12]

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12. To cite just one example, the "public perception" supported the internment of Japanese-Americans during World War II for reasons of

In *New Jersey v. T.L.O.*, *supra*, Mr. Justice Brennan identified the perils which can arise when state officials are influenced in their conduct by "public perception," as they alone have interpreted it:

> "Moved by whatever momentary evil has aroused their fears, officials—perhaps even supported by a majority of citizens—may be tempted to conduct searches that sacrifice the liberty of each citizen to assuage the perceived evil."

469 U.S. at 325 (Brennan, J. concurring and dissenting) (footnote omitted).

That danger has become a reality in the instant case. Lacking any evidence of drug or alcohol abuse by jockeys in New Jersey,[13] respondents sought to justify the regulations at issue by reference to their professed interest in protecting the "public perception" of the integrity of racing.[14] However, respondents could not even offer any support for that proposi-

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"security", and the Government utilized that perception not only to put the law into effect but also to obtain convictions thereunder, some of which were ultimately affirmed by this Court. Recent disclosures, however, have demonstrated that the "public perception," which was both generated and manipulated by the Government, never had any basis in fact. *See Hohri v. United States*, 586 F. Supp 769 (D.D.C. 1984); *Korematsu v. United States*, 584 F. Supp. 1406, 1416-17 (N.D. Cal. 1984).

13. In the absence of any evidence relating to jockeys, the district court made reference to evidence of drug abuse among athletes in other sports, including harness drivers and baseball players, and then found that there is "no reason to believe" that the level of drug or alcohol use among jockeys was any different. 619 F. Supp. at 1103. Petitioners believe that to be an example of guilt by association, of the type rejected by this Court in *Ybarra v. Illinois*, 444 U.S. 85 (1979), and by the Eighth Circuit in *Hunter v. Auger*, *supra*.

14. Thus, the respondents contended (and the Third Circuit ultimately found) that the State's interest which justified the tests was not even that of protecting the integrity of racing as a *fact*, but merely the *impression* thereof. Petitioners respectfully submit that it requires an inverted sense of values to contend that an intrusion upon constitutional rights can be justified on the basis of a mere impression, particularly where, as here, the ultimate interest of the State is nothing more than the revenue it receives from gambling.

tion, because they had never held any hearings, or prepared any reports, or gathered one iota of evidence to determine what the *public's* perception actually was, or whether there was any basis therefor. As a result, when the Third Circuit upheld the random drug and alcohol tests which are at issue, it could not do so on the basis of any actual or suspected violation of a law or rule, or even on the basis of any actual impact on the public's perception of the integrity of racing. Instead, the sole justification which the Third Circuit offered for these warrantless searches was its own hypothesis about what the *potential* impact upon public confidence might be, *if* a problem of substance abuse were found (or thought by the public) to exist.[15]

In relying upon potential harm to a "public perception", rather than a suspected violation of a law or rule, the Third Circuit has clearly gone far beyond the bounds of any rational analysis of Fourth Amendment rights, and left no meaningful standard for judicial review of official conduct. For that reason alone, its decision must be reversed by this Court.

In addition, petitioners believe that the "public perception" concept creates a significant problem, with potentially far-reaching consequences, under the equal protection clause. The petitioners do not intend to pursue in this Court the equal protection argument they made in the courts below, primarily because they believe their Fourth Amendment argument to be dispositive of this case. However, petitioners respectfully submit that the Third Circuit's reasoning has raised a new problem under the equal protection clause, by suggesting that the "public perception"—as interpreted by state officials—can be substituted for a rational basis premised on articulable facts,

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15. To use the words of the Third Circuit, the random drug and alcohol tests were permissible simply because:

> "Substance abuse by jockeys, who are the most visible human participants in the sport, *could affect public confidence* in the integrity of that sport."

795 F.2d at 1144 (emphasis added).

when distinguishing between the constitutional rights of different groups of individuals.[16]

Petitioners believe that before the state can take action which intrudes upon an individual's constitutional rights, it should at least be required to have a reason which is based on *fact*, rather than theory or speculation. For that reason, petitioners respectfully request this Court to take cognizance of the full implications of the Third Circuit's decision, and reject its "public perception" concept in the clearest of terms.

B. The Exception to the Warrant Requirement for Inspections of Pervasively Regulated Industries Is Not Applicable to Searches of Individuals

The other basis which the Third Circuit offered as justification for the warrantless searches of jockeys in this case was that they qualified as administrative inspections within a pervasively regulated industry. Although not quite as dangerous as the "public perception" concept, this contention is equally incorrect.

Administrative inspections of private property—including systematic "area" inspections—have been common since the earliest days of the Republic. For the most part, they were instituted to protect the safety and health of the community at large by controlling or eliminating problems like fire and disease, which can be transmitted rapidly and involuntarily throughout the community in conflagrations and epidemics that result in major catastrophes. Because of their importance to the public interest, it was initially held that such inspections could be conducted without warrants, even though they consti-

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16. If "public perception" alone could be used as the test for depriving certain individuals of their constitutional rights, it would raise a host of questions to be litigated. For instance, how is it to be measured—may the State design and conduct its own opinion poll, or must it commission an outside study? In either event, how broad must the sample be in order for the poll to be valid? Most significantly, does the substance of the State's rules change whenever the "public perception" changes, and how often must it then be measured for change? It is the existence of these questions which makes the "public perception" standard unworkable in practice as well as unsound in theory.

tuted searches within the meaning of the Fourth Amendment. *Frank v. Maryland*, 395 U.S. 360 (1959). In 1967, however, this Court held that warrants were required even for administrative inspections, if cooperation was refused. *Camara v. Municipal Court*, 387 U.S. 523 (1967) (private dwelling); *See v. City of Seattle*, 387 U.S. 541 (1967) (commercial premises).

Since this Court's decisions in *Camara* and *See*, it has recognized only three exceptions to the requirement for a warrant. These all involved administrative inspections of commercial property within a pervasively regulated industry. *See United States v. Biswell*, 406 U.S. 311 (1972) (gun selling); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (liquor industry);[17] *Donovan v. Dewey*, 452 U.S. 594 (1981) (Federal Mine Safety & Health Act, as extended to quarries).

However, this Court has noted that this unusual treatment is clearly the exception, not the rule. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978).[18] Petitioners respectfully submit that there is no basis for extending that limited exception to the urine and breathalyzer tests of individuals involved in the instant case.

In the first place, the opinion of the Third Circuit does not cite any Supreme Court decision, and petitioners are aware of none, in which the "pervasively regulated business" exception has been applied to anything other than inspection of business premises. In *Donovan*, the Court expressly noted that the exception would not apply even to searches of a home, 452 U.S. at 598-99 and n.6, and petitioners respectfully submit that searches of the person should be accorded at least the same sanctity as searches of the home. Clearly, that is what was contemplated by this Court when it held, in *Schmerber v. California*, *supra*:

> "Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, *no less could be*

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17. Even in *Colonnade*, this Court held that entry for an inspection could not be made without a warrant, in the absence of consent. 397 U.S. at 77.

18. See also *Donovan v. Dewey*, *supra*, 452 U.S. at 608 (Rehnquist, J., concurring).

required where intrusions into the human body are concerned."

384 U.S. at 770 (emphasis added).

Secondly, the cases invoking the "pervasively regulated business" exception have each involved administrative inspections which are directly related to a statutory scheme of regulation, *and* are expressly authorized thereby. *See Donovan v. Dewey, supra*, 452 U.S. at 599-604. In this case, there is *no* authorization to conduct searches of individuals in the enabling statute, and there is also no basis for asserting that the drug and alcohol tests implement the regulatory scheme that is described therein.[19] Indeed, the use of drugs and alcohol by humans, which these searches are designed to detect, is not mentioned at all in the statute, nor even in the regulations as they existed prior to April 1, 1985.

Consequently, these new regulations are not merely an extension of existing regulations into a new field, like the quarry inspections in *Donovan*. Instead, they bring an entirely new dimension to a scheme of regulations which has worked smoothly for decades. For this reason, it cannot reasonably be said that the imposition of these new regulations, prior to the issuance of a new annual license, could suddenly reduce the jockeys' legitimate expectations of privacy to the point where they could be deemed to have "consented" to such tests, after they have ridden for years without any apparent need for them.[20]

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19. To the extent that the "regulatory scheme" is detailed at all in the enabling statute at issue in this case, it is concerned primarily with the organization of the NJRC (which is authorized to make rules and regulations governing the conduct of *races*, as opposed to the private lives of its licensees), and the distribution of revenue received from the tracks. *See* N.J. Stat. Ann. § 5:5-30 (West 1973); *id.*, § 5:5-33 (West Supp. 1985).

20. The petitioners have forcefully stated in the record their reaction to these tests. A urine test, except one conducted in the ordinary course of a medical examination, is a test associated in the minds of the public primarily with the commission of a crime. In this case, the jockeys' reaction also reflects their lifelong struggle to maintain their basic human dignity against the barbs brought upon them by their short stature and their often humble background. Thus, the tests tend to undermine the element of self respect, which is the greatest deterrent to the use of drugs and alcohol.

Finally, as noted above, administrative inspections—including those which fall within the pervasively regulated industry exception—are generally authorized because they affect the health or safety interests of the community at large. Here, there is no direct or immediate danger to the public's safety or health. To the contrary, it is absurd for the respondents to contend, on the facts of this case, that the regulations were imposed in the interest of safety even among the jockeys themselves, because (a) the drug test has no impact on safety, since it is not even administered until *after* the race, and (b) there is no evidence that any jockey has ever ridden in New Jersey while impaired by drugs or alcohol, much less caused an accident as a result of being in such condition.

Without minimizing in any way the problem of drugs and alcohol in our society, the fact remains that where it exists, such abuse is transferred slowly and only with the voluntary participation of each individual transferee. These are individual, social problems—and as such are not the type of problems that administrative inspections were developed to address.

In reality, the essence of respondents' "pervasively regulated industry" argument—and of the Third Circuit's holding thereon—is that respondents should be held to a lesser standard because they hold a certain degree of supervisory and disciplinary authority over the jockeys, which they are required to exercise in order to protect the integrity of racing. However, that contention does no more than to bring this case within the rule of *New Jersey v. T.L.O.* and *Security Employees*, *supra*, both of which involved searches by officials who exercise their authority in a highly regulated environment. If reasonable grounds for suspicion are required of a teacher to search a student, or of a warden to search a prison guard, then petitioners submit that no less can be required of a racing official who seeks to search a jockey.

III. THIS CASE WOULD GIVE THE SUPREME COURT THE OPPORTUNITY TO GUIDE THE LOWER COURTS WITH RESPECT TO WARRANTLESS URINE AND BREATHALYZER TESTS BY EXTENDING EXISTING DOCTRINES INTO THIS AREA

A. A National Controversy Exists over the Administration of Drug and Alcohol Tests

The problem of drug use and abuse has drawn increasing attention on the national scene over the past year or two. Programs of drug testing have been proposed and implemented in a variety of contexts and for a variety of people, including military personnel, police officers, firemen, teachers and others. Most recently, President Reagan has proposed a program of drug testing for every federal employee whose job entails public safety or health or other functions requiring a high degree of trust and confidence.

Not surprisingly, this headlong rush toward universal drug testing has generated a substantial amount of controversy and litigation, and is continuing to do so. For the most part, the debate and lawsuits have focused on the significant intrusion upon an individual's privacy which drug testing necessarily entails, because it can only be accomplished by urinalysis—a process that, in order to be valid, requires the performance of an individual's most personal and private bodily function in the presence of at least one representative of the state or other entity conducting the test.

Whether these tests are regarded as administrative inspections extended to the person, as measures intended to implement "discipline" in a special environment, or as quasi-criminal inspections which may result in sanctions against the individual, the same standard of "reasonableness" under the Fourth Amendment applies. It calls for "a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Bell v. Wolfish*, *supra*, 441 U.S. at 559.

B. The Reasonable Suspicion Standard Should Apply, Absent a Direct and Immediate Threat to the Safety or Health of the Public at Large

Existing case law dictates that a statute or regulation cannot properly authorize a search of the individual on anything less than reasonable suspicion,[21] and that both the method and the scope of the search must be reasonably calculated to produce evidence in furtherance of the state's legitimate objective.[22] Petitioners respectfully submit that no erosion of those principles should be permitted unless the State can demonstrate, in balancing its interests against the rights of the individual, that the object of the search—or the condition which a drug test seeks to detect—constitutes *a direct and immediate danger* to the public's safety or health.[23]

This case starkly demonstrates the need for such a rule in the case of urine and breathalyzer tests. As we have repeatedly stated, there was no evidence in the record that any jockey was ever injured in any race, anywhere or at any time, as a result of drug abuse, and only one racing accident has ever been related to alcohol abuse. More importantly, however, there was absolutely no evidence that any patron or *member of the public at large* was ever injured by a rider or his horse in a race, whatever the cause. In other words, there was *zero* relationship between the condition being tested for and the public's safety

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21. *See New Jersey v. T.L.O.*, *supra* and other cases cited in Part I hereof; *accord*, *McDonell v. Hunter*, 612 F. Supp. 1122 (S.D. Iowa 1985); *Turner v. Fraternal Order of Police*, 500 A.2d 1005 (D.C. App. 1985); *City of Palm Bay v. Bauman*, 475 So. 2d 1322 (Fla. App. 1985). This principle applies even though completely discretionary searches might be more effective in achieving the purpose of the subject regulation. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Delaware v. Prouse*, *supra*.

22. *See Delaware v. Prouse*, *supra*; *Security Employees v. Carey*, *supra*.

23. *Cf. Camara v. Municipal Court*, *supra*, 387 U.S. at 535 ("The primary governmental interest at stake [in administrative inspections] is to prevent . . . conditions which are hazardous to public health and safety."); *see also Frank v. Maryland*, *supra*.

or health.[24] In these circumstances, there is no reason to dilute the protection afforded by the Fourth Amendment.[25]

While most lower courts have applied this Court's "reasonable suspicion" standard to drug testing, some have exhibited confusion on that issue.[26] Petitioners respectfully submit that

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24. It may well be that such a relationship can be established in some other contexts, where the lives of hundreds or thousands of people, or even the national security, may depend upon the reflexes or conduct of one individual. *Cf. Railway Labor Executives Assn'n v. Dole*, No. C-85-7958 (N.D. Cal. Nov. 26, 1985) (drug testing of federal railroad workers; decision pending in Ninth Circuit Court of Appeals); *Mack v. United States*, 83 Civ. 5764 (S.D.N.Y. Apr. 18, 1986) (drug testing of FBI agent). We are simply saying that it does not exist in the thoroughbred racing industry.

25. The test of "reasonable suspicion" is not toothless. In the long run, it may prove more flexible than a chemical test of uncertain validity and procedures which raise a second tier of constitutional questions. In this case, for example, the requirement of "reasonable suspicion" would avoid the need to investigate whether some other procedure might implement the purpose of the statute in a way that did not offend the Fourth Amendment—such as a procedure under which all jockeys are tested, or every tenth jockey is tested, or every jockey who is chosen in a statistically random sample is tested. *See* Mr. Justice Blackmun's concurring opinion in *Delaware v. Prouse*, 440 U.S. 648 at 663. It would also avoid the need to consider whether the dice are loaded in favor of discretion where, as here, the names of three jockeys are drawn from a hat containing the names of the six to nine jockeys riding in a race, and the track steward has discretion to pick the race, subject only to the limitation that the same jockey not be tested more than three times in a week. *Cf. Storms v. Coughlin*, *supra*, 600 F.Supp. at 1223. Finally, there would be no need to condone a dilution in the constitutional protection afforded some individuals, if in fact everyone should be tested, simply because the test is too expensive to administer to everyone.

26. *Shoemaker* itself is the primary example of such confusion, and its reasoning was expressly adopted by at least one state court in upholding urinalyses conducted in conjunction with periodical physical examinations. *Seelig v. McMickens*, N.Y.L.J., Aug. 7, 1986 at 7, col. 1 (Sup. Ct. N.Y. Co. Aug. 5, 1986). In addition, a number of courts have since felt compelled to distinguish *Shoemaker* on the basis of the "pervasively regulated industry" exception—as if it truly applied—before proceeding to rule upon the testing procedures that were at issue before them. *See Capua v. City of Plainfield*, Civ. No. 86-2992 (D.N.J. Sept. 18, 1986); *Patchogue-Medford Congress of Teachers v. Board of Education*, N.Y.L.J., Aug. 12, 1986 at 3, col. 1 (N.Y. App. Div., 2d Dep't Aug. 11, 1986) *Caruso v. Ward*, N.Y.L.J., Aug. 29,

by considering the instant case in contradistinction to others in which there is a direct relationship to the public health and safety, this Court can take advantage of a timely opportunity to extend existing constitutional guidelines to urine and breathalyzer tests. Provided with such guidance, the lower courts, legislators, and regulatory agencies who are presently concerned with the issue could devote their efforts to abiding by the rules, rather than engaging in years or even decades of further litigation over what those standards should be.

CONCLUSION

For the foregoing reasons, we respectfully submit that this petition for a writ of *certiorari* to the U.S. Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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1986 at 11, col. 2 (Sup. Ct., N.Y. Co. July 1, 1986). Finally, there is another category of decisions which have upheld drug tests on grounds that petitioners believe are tantamount to reasonable suspicion, but have not specifically identified the standard being applied. *See Division 241, Amalgamated Transit Union v. Suscy, supra*; *Allen v. City of Marietta, supra.*

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 85-5655

WILLIAM SHOEMAKER,
ANGEL CORDERO, JR.,
WILLIAM HERBERT McCAULEY,
PHILIP GROVE, and
VINCENT BRACCIOLE,
Appellants

v.

HAL HANDEL, Executive Director of
the New Jersey Racing Commission,
SAMUEL A. BOULMETIS, Steward
Representing New Jersey Racing Commission,
JOSEPH F. PIARULLI, Associate Steward,
CARL H. HANFORD, Associate Steward, and
RICHARD W. LAWRENSON, Associate Steward

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT
OF NEW JERSEY - CAMDEN
D.C. Civil No. 85-1770

Argued: April 18, 1986
Before: ADAMS, GIBBONS, and WEIS,
Circuit Judges

(Opinion filed: July 10, 1986)

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OPINION OF THE COURT

GIBBONS, *Circuit Judge:*

Five well known jockeys appeal from an adverse decision in their action seeking declaratory and injunctive relief against officials of the New Jersey Racing Commission. The action challenges the constitutionality of regulations adopted by the Commission that permit the State Racing Steward to direct any official, jockey, trainer, or groom to submit to breathalyzer and urine testing to detect alcohol or drug consumption. The regulations provide for sanctions of varying severity, including lifetime suspension from racing for persons testing positive.

The jockey plaintiffs contend that the regulations violate their rights under the fourth, fifth, ninth, and fourteenth amendments to the Constitution. After a trial the district court made findings of fact and conclusions of law in which all of the jockeys' challenges to the regulations were rejected. We affirm.

I.

The New Jersey Racing Commission regulates horse racing in that state. Its statutory powers include "full power to prescribe, rules, regulations and conditions under which all horse races shall be conducted." N.J. Stat. Ann. § 5:5-30 (West 1973). The racing industry involves parimutual wagering, and the state receives a part of the revenue derived from such wagering. N.J. Stat. Ann. §§ 5:5-64, 5:5-64.1 (West Supp. 1985).

> All parimutual employees and all horse owners, riders, agents, trainers, stewards, starters, timers, judges, grooms, drivers, and others, acting in any capacity in connection with the training of the horses or the actual running of the races in any such race meeting may be licensed by the commission, pursuant to such rules and regulations as the commission may adopt.

Id. § 5:5-33. Because the public wagers on the outcome of races, the Commission's regulations have focused upon the necessity for preserving both the fact and the appearance of integrity of the racing performances. Thus, for example, the Commission's regulations for many years have placed on the trainer of a horse the absolute duty, regardless of fault, to protect the horse from the administration of drugs that might affect its performance. *See Dare v. State ex rel. Deptartment of Law and Public Safety, Division of New Jersey*

Racing Commission, 159 N.J. Super. 533, 538-89, 388 A.2d 984, 986 (App. Div. 1978) (per curiam). Moreover to assure the discharge of this duty, the Commission's regulations have for many years provided for postrace specimen testing of horses and, if tests prove positive for a drug or foreign substance, for warrantless searches of the premises occupied by the stable involved. *See State v. Dolce*, 178 N.J. Super. 275, 284-87, 428 A.2d 947, 952-54 (App. Div. 1981). The present version of these regulations is in Subchapter 14A of the Commission's regulations, entitled Medication and Testing Procedures. N.J. Admin. Code tit. 13, §§ 70-14A.1 to 70-14A.11 (1985).

The regulations challenged in this action are also parts of Subchapter 14A. They were proposed by notice in the New Jersey Register in 1984 and adopted in January 1985, effective as of April 1, 1985. The first regulation requires that officials, jockeys, trainers, and grooms shall, when directed by the State Steward, submit to breathalyzer tests for the detection of alcohol.[1] The second regulation provides that every official, jockey, trainer, and groom for any race may be

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1. The regulation provides in full,

> Officials, jockeys, trainers and grooms shall, when directed by the State Steward, submit to a breathalyzer test and if the results thereof show a reading of more than .05 percent of alcohol in the blood, such person shall not be permitted to continue his duties. The stewards may fine or suspend any participant who records a blood alcohol reading of .05 percent or more. Any participant who records a reading above the prescribed level on more than one occasion shall be subject to expulsion, or such penalty as the stewards may deem appropriate.

N.J. Admin. Code tit. 13, § 70-14A.10 (1985).

This regulation is similar to a regulation that has applied to harness race drivers since 1969. N.J. Admin. Code tit. 13, § 71-18.1 (1985).

subjected to a urine test for the detection of use of "Controlled Dangerous Substance[s]", and may be subjected to sanctions for failure to submit to such a test, and for positive results in such a test.[2]

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2. This regulation provides in full.

(a) No licensee or official shall use any Controlled Dangerous Substance as defined in the "New Jersey Controlled Dangerous Substance Act", N.J.S.A. 24:21-1, et seq. or any prescription legend drug, unless such substance was obtained directly, or pursuant to a valid prescription or order from a licensed physician, while acting in the course of his professional practice. It shall be the responsibility of the official, jockey, trainer and groom to give notice to the State Steward that he is using a Controlled Dangerous Substance or prescription legend drug pursuant to a valid prescription or order from a licensed practioner when requested.

(b) Every official, jockey, trainer and groom for any race at any licensed racetrack may be subjected to a urine test, or other non-invasive fluid test at the direction of the State Steward in a manner prescribed by the New Jersey Racing Commission. Any official, jockey, trainer or groom who fails to submit to a urine test when requested to do so by the State Steward shall be liable to the penalties provided in N.J.A.C. 13:70-31.

(c) Any official, jockey, trainer and groom who is requested to submit to a urine test shall provide the urine sample, without undue delay, to a chemical inspector of the Commission. The sample so taken shall be immediately sealed and tagged on the form provided by the Commission and the evidence of such sealing shall be indicated by the signature of the tested official, jockey, trainer or groom. The portion of the form which is provided to the laboratory for analysis shall not identify the individual official, jockey, trainer or groom by name. It shall be the obligation of the official, jockey, trainer or groom to cooperate fully with the Chemical Inspector in obtaining any sample which may be required to witness the securing of such sample.

(d) A "positive" Controlled Dangerous Substance or prescription drug result shall be reported, in writing, to the Executive Director or his designee. On receiving written

Shortly after the effective date of the regulations, the jockeys, all of whom are licensed by the Commission, filed this action pursuant to section 1983 of title 42 of the United States Code, 42 U.S.C. § 1983 (1982), seeking to restrain the Commission and its agents from enforcing the regulations on the grounds that the regulations were unconstitutional. The plaintiffs moved for a preliminary injunction,

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notice from the official chemist that a specimen has been found "positive" for controlled dangerous substances or prescription legend drug, the Executive Director or his designee shall proceed as follows:

1. He shall, as quickly as possible, notify the official, jockey, trainer and groom involved in writing.

2. For an official, jockey, trainer or groom's first violation, he shall issue a written reprimand and warning and notify the official, jockey, trainer or groom that he will be subject to mandatory drug testing and that any further violation shall result in the sanctions described in paragraphs (3) and (4) below:

3. For an official, jockey, trainer or groom's second violation, he shall require the official, jockey, trainer or groom to enroll in a Supervisory Treatment Program approved by the New Jersey Racing Commission upon such reasonable terms and conditions as he may require. The official, jockey, trainer or groom shall be permitted to participate unless his continued participation shall be deemed, by the Executive Director or his designee, to be detrimental to the best interests of racing. It shall be the official, jockey, trainer or groom's responsibility to provide the Commission with written notice of his enrollment, weekly status reports and written notice that he has successfully completed the program and has been discharged. If an official, jockey, trainer or groom fails to comply with these requirements, he shall be liable to the penalties provided in N.J.A.C. 13:70-31.

4. For official, jockey, trainer or groom's third or subsequent violation, he shall be liable to the penalties provided in Subchapter 31 and may only enroll into a Supervisory Treatment Program in lieu of said penalties, with the approval of the New Jersey Racing Commission.

which the district court denied. The defendants moved for a dismissal of the complaint or for summary judgment, which the court also denied. After a bench trial the district court denied injunctive relief.

The district court's findings, which are not disputed, establish that jockeys are required to take a breathalyzer test daily, while grooms, trainers, and officials are tested less frequently. The breathalyzer apparatus is set up in or near the jockey's room and is run by an operator. The test, which requires that the jockey step up to a machine and breathe, is painless. The machine determines the level of blood alcohol from the expelled breath and indicates a positive reading by means of a red light visible to others in the room.

(e) Any information received in the process of obtaining a urine sample, including but not limited to medical information, the results of any urine test, and any reports filed as a result of attending a Supervisory Treatment Program shall be treated as confidential, except for their use with respect to a ruling issued pursuant to this rule, or any administrative or judicial hearing with regard to such a ruling. Access to the information received and/or reports of any positive results and/or reports from a Supervisory Treatment Program shall be limited to the Commissioners of the New Jersey Racing Commission, the Executive Director and/or his designee, Counsel to the Racing Commission and the subject, except in the instance of a contested matter. In the instance of a contested matter, any information received and reports prepared shall not be disclosed without the approval of the Executive Director or his designee.

(f) Information received and reports prepared pursuant to this rule shall be stored in a locked secure area in the office of the Executive Director for a period of one year, after which time, they shall be destroyed. However, the Commission may maintain the information received and reports on individuals who have violated this rule for the purpose of recording the number of violations and the results of supervisory treatment, and for use should future violations occur.

N.J. Admin. Code tit. 13, § 70-14A.11 (1985).

The district court found that while postrace urine tests are required "at the direction of the State Steward," N.J. Admin. Code tit. 13, § 70-14A.11(b), the Commission has implemented the urine testing program by a method of random selection. The names of all participating jockeys at a given race are placed in an envelope. The State Steward or a representative draws the names of three to five jockeys for testing. A representative of the Jockey's Guild is invited to supervise the selection of names. The Commission may alter the number of names to be drawn each day. If a jockey's name is drawn more than three times in a seven-day period, the steward disregards the selection and draws another name. The jockeys whose names are selected must provide urine samples after their last race of the day. They are given plastic containers for this purpose. They are also required to fill out certification forms concerning the use of prescription or non-prescription medications. The certification form is to provide information about drugs covered by an exception in the regulations for any "substance . . . obtained directly, or pursuant to a valid prescription or order from a licensed physician." N.J. Admin. Code tit. 13, § 70-14A.11(a). The form, as currently in use, provides for the optional disclosure of the condition for which the disclosed drug is a treatment. The certification forms contain two identical numbers. One number is removed and fastened to the urine sample, while the other number remains on the form. The anonymous urine sample is then sent to a laboratory for testing, and the form is sent to the Executive Director of the Commission and stored in a safe.

Urine test results are sent by the laboratory to the Executive Director and are available to that official, a designee, and the Commissioners. Pursuant to the express provisions of the regulations, the results are kept confidential even from the enforcement agencies.

N.J. Admin. Code tit. 13, § 70-14A.11(e). The test results may only be used "with respect to a ruling issued pursuant to [section 70-14A.11], or any administrative or judicial hearing with regard to such a ruling." *Id.* The New Jersey Division of Criminal Justice, which is headed by the Attorney General, has issued an advisory opinion voicing no objection to the confidentiality regulation and stating that it is unaware of any statute that would require the Commission to report suspected drug use to any prosecutorial authorities. On May 24, 1985, while this action was pending, the Commission proposed amendments to the urine-testing regulation to broaden the confidentiality requirements so as to cover all information obtained pursuant to the rule, to prohibit disclosure without approval of the Executive Director of the Commission or a designee and to destroy test results after a year except when violations have been discovered. N.J. Admin. Code tit. 13, § 70-14A.11(f) (1985). During the comment period before the proposed amendments to the rule become effective the Commission treated the collected information as if the confidentiality amendments were in effect.

The breathalyzer regulation does not provide for the preservation of confidentiality of results nor for privacy of administration. N.J. Admin. Code tit. 13, § 70-14A.10. The Commission prefers, however, to administer the breathalyzer tests in private.

Jockeys "reduce" or lose weight quickly, by eliminating excess body fluids so as to lighten the load a horse must carry in a race. This lessens their ability promptly to provide postrace urine samples. Thus many jockeys selected for urine sampling have been delayed after their last race for up to an hour. If the State Steward determines that a jockey cannot provide a sample, the jockey is excused and retested the next

day. If the jockey leaves without giving a sample or without being excused, the State Steward will notify the jockey of a hearing, and the jockey may be subject to the penalties. *See* N.J. Admin. Code tit. 13, § 70-31.3 (1982). Those penalties include fines, suspensions, and loss of license. *Id.*

Positive test results in the urine test may disclose not only use of drugs at the race track, but also off-premises drug use for as long as a week prior to the day of the test. The prohibition in the Commission's regulations against use of controlled substances applies to any such use. N.J. Admin. Code tit. 13, § 70:14A.11(a).

II.

The jockeys do not contend that jockeys with more than .05 percent of alcohol in their blood should be permitted to ride. Thus they do not challenge the substantive prohibition in section 70-14A.10. Nor do they contend that they should be free to use controlled substances. Rather, they contend (1) that both regulations are unconstitutional facially and as applied in that they authorize searches and seizures that violate the fourth amendment; (2) that the enforcement scheme deprives them of equal protection of the laws; and (3) that the enforcement scheme violates their constitutional right to privacy.

A. The Fourth Amendment

The jockeys urge that neither the mandatory daily breathalyzer test nor the random urine test may be required without an individualized suspicion. The jockeys concede that if the racing officials are aware of specific objective facts suggesting that certain persons have recently used alcohol or drugs a warrantless production of a breath or urine sample could be demanded. Focusing particularly on section

70-14A.11(b), they contend that this regulation vests far too much discretion in the Commission as to who will be targeted for testing. The Commission does not argue that the mandatory tests do not involve a search or seizure within the meaning of the Fourth Amendment. Instead it urges that such warrantless searches or seizures by voluntary praticipants in the highly regulated racing industry are reasonable.

Since 1939, when article IV, section 7, paragraph 2 of the New Jersey Constitution was amended to make it lawful "to hold, carry on, and operate in this state race meetings whereat the trotting, running or steeplechase racing of horses . . . may be conducted . . . at which the pari-mutuel system of betting shall be permitted,"[3] the horse racing industry has been among the state's most highly regulated industries. That constitutional provision was implemented into legislation that established the Commission and gave it broad rulemaking authority. *See* Pub. L. 1940 c. 17, §§ 1-58 (codified as amended at N.J. Stat. Ann. § 5:5-22 to 5:5-99 (West 1973 and West Supp. 1985)). From its initial enactment, the statute permitted the licensing of all employees in the industry. Pub. L. 1940, c. 17, p.

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3. *See* N.J. Const. 1844, art. IV, § 7, par. 2, as amended in 1939. The 1939 amendment is reprinted in *Revised Statutes of New Jersey Cumulative Supplement Laws of 1938 & 1939* XVI (J. Sarnoff ed. 1940). *See also* Atlantic City Racing Ass'n v. Attorney General, 98 N.J. 535, 541, 489 A.2d 165, 168 (1985) (reprinting the 1939 amendment). In 1947 New Jersey revised its 1844 Constitution. The current version of article iv, section 7, paragraph 2 does not contain any specific reference to pari-mutuel betting on horse racing. *See* N.J. Const. 1947, art. IV, § 7, par. 2, *reprinted as amended in* N.J. Stat. Ann. (West. Supp. 1985). Instead the authority for betting on horse racing allowed by the 1939 amendment was incorporated by indirect reference in the first clause of article IV, section 7, paragraph 2 of the 1947 Constitution. *See* 1 & 2 *State of New Jersey Constitution Convention of 1947*, 355, 427-47, 1095.

74, § 13 (codified as amended at N.J. Stat. Ann. § 5:5-33 (West Supp. 1985)). Because of the state's interest in the revenue generated by wagering and the vulnerability of the industry to untoward influences, the statute has always provided that no person could be employed in any capacity at a racetrack "who has been convicted of a crime involving moral turpitude." Pub. L. 1940, c. 17, p. 75, § 14 (codified at N.J. Stat. Ann. § 5:5-34).[4] From the beginning the Commission has had the authority to prescribe conditions under which licenses may be issued and revoked. N.J. Stat. Ann. § 5:5-33. Thus all licensees have always participated in the industry with full awareness that it is the subject of intense state regulation. Those regulations have two separate but interrelated purposes; the protection of the wagering public, and the protection of the state's fisc by virtue of the wagering public's confidence in the integrity of the industry.

In general a warrant is required for a search to be considered reasonable under the fourth amendment. *See, e.g., Payton v. New York*, 445 U.S. 573, 586 (1980); *See v. City of Seattle*, 387 U.S. 541, 545 (1967). In closely regulated industries, however, an exception to the warrant requirement has been carved out for searches of premises pursuant to an administrative inspection sheme. *See, e.g., Donovan v. Dewey*, 452 U.S. 594, 602-05 (1981)(coal mines); *United States v. Biswell*, 406 U.S. 311, 316-17 (1972) (gun selling); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76-77 (1970) (liquor industry). Although it it clear that the New Jersey horse-racing

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4. The literal stricture of this provision probably is modified by the Rehabilitated Convicted Offenders Act, N.J. Stat. Ann. §§ 2A:168A-1 to 168A-6 (West 1985). *See* Maietta v. New Jersey Racing Comm'n, 183 N.J. Super. 397, 444 A.2d 55, 59-60 (App. Div. 1982), *aff'd*, 93 N.J. 1, 459 A.2d 295 (1983).

industry is closely regulated, the question that arises in this case is whether the administrative search exception extends to the warrantless testing of persons engaged in the regulated activity.

There are two interrelated requirements justifying the warrantless administrative search exception. First, there must be a strong state interest in conducting an unannounced search. *See Donovan*, 452 U.S. at 600. Second, the pervasive regulation of the industry must have reduced the justifiable privacy expectation of the subject of the search. *Id.* Both these requirements are present in the warrantless testing of persons involved in the New Jersey horse racing industry.

New Jersey has a strong interest in assuring the public of the integrity of the persons engaged in the horse racing industry. Public confidence forms the foundation for the success of an industry based on wagering. Frequent alcohol and drug testing is an effective means of demonstrating that persons engaged in the horse racing industry are not subject to certain outside influences. It is the public's perception, not the known suspicion, that triggers the state's strong interest in conducting warrantless testing.

It is also clear that the Commission historically has exercised its rulemaking authority in ways that have reduced the justifiable privacy expectations of persons engaged in the horse-racing industry. When jockeys chose to become involved in this pervasively-regulated business and accepted a state license, they did so with the knowledge that the Commission would exercise its authority to assure public confidence in the integrity of the industry. Even before the regulations challenged here were adopted, the jockeys were aware that the Commission had promul gated regulations providing for warrantless searches of stables. In addition, unlike the traditional warrantless search situation, the searches at issue in this case are not unannounced.

The jockeys were put on notice that after April 1, 1985 they would be subject to warrantless testing on days that they were engaged to race.

Consequently, while there are distinctions between searches of premises and searches of persons, in the intensely-regulated field of horse racing, where the persons engaged in the regulated activity are the principal regulatory concern, the distinctions are not so significant that warrantless testing for alcohol and drug use can be said to be constitutionally unreasonable. We therefore hold that the administrative search exception applies to warrantless breath and urine testing of employees in the heavily regulated horse-racing industry.[5]

Having determined that the administrative search exception applies to the testing of persons engaged in the horse racing industry, there remains the question whether the discretion of the Commission in conducting these searches is sufficiently circumscribed. There is a difference between the manner in which the breathalyzer regulation has been implemented and the manner in which the urine testing regulation has been implemented. Each jockey is required to take a breathalyzer test daily. Thus as this program has been implemented there is no room for standardless discretion. Every jockey knows that an alcohol blood level greater than .05 percent will be detected. The jockeys complain that section 70-14A.10 could be construed to vest standardless discretion in the State Steward, and thus to countenance the abuses anticipated by the Supreme Court in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). As the district

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5. Our holding applies only to breathalyzer and urine sampling of voluntary participants in a highly-regulated industry. Thus it should not be read as dispositive of the distinct issue presented in testing of children subject to mandatory school attendance laws or the testing of motor vehicle drivers.

court found, however, as to jockeys it has not been so construed. If it should be, the jockeys are free to return to the district court to litigage that issue.[6]

The urine testing regulation provides that every jockey "may be subjected to a urine test." N.J. Admin. Code tit. 13, § 70-14A.11(b). The trial court found that while all jockeys are at risk of such a test, not all are selected each day. Thus the question presented by the urine testing program as it operates is whether the random selection method is consistent with the requirements of the fourth amendment.

Random searches and seizures that have been held to violate the fourth amendment have left the exercise of discretion as to selected targets in the hands of a field officer with no limiting guidelines. *See, e.g., Delaware v. Prouse*, 440 U.S. 648, 661 (1979); *United States v. Brignoni-Ponce*, 422 U.S. 873, 882-84 (1975). In the present case the urine tests are mandated by the administrative scheme. The State Steward has no discretion in conducting the tests. Moreover the State Steward has no discretion as to who will be selected for urine testing. That choice is made by a lottery. The determination that a daily program of urine testing at the track, with targets selected randomly, was the most effective means for allocating available resources was made by the Commission, not the field officers. Thus we hold that daily selection by lot of jockeys to be subjected to urine testing does not violate the fourth amendment.[7] *See United States v. Martinez-Fuerte*,

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6. This issue would not be foreclosed by our holding that the regulation as applied -- requiring all jockeys to submit to a warrantless breathalyzer test on each racing day -- does not violate the fourth amendment.

7. To the extent that our holding, that the state may validly seize breath and urine samples from voluntary participants in the regulated racing industry without a warrant, is inconsistent with the reasoning of Security and Law Enforcement Employees, Dist.

428 U.S. 543, 564-66 (1976)(holding valid search at checkpoint selected by officials responsible for allocating law enforcement resources).

B. Equal Protection

The jockeys point out that, while all jockeys must submit to a daily breathalyzer test, officials, trainers, and grooms are not subjected to daily testing and that only the jockeys are currently subjected to random selection for the urine testing. Relying on *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), they contend that such selective enforcement denies jockeys the equal protection of the laws. The district court rejected this contention, relying primarily on the fact that safety concerns are greatest during the running of a race when most serious accidents can occur. The jockeys counter, however, that while this justification may suffice with respect to the breathalyzer tests, it hardly suffices with respect to urine testing, which occurs after the race, not before.

We prefer to rest our affirmance with respect to urine testing on a different ground. As previously noted, the intense regulation of the racing industry is justified because of public wagering on the outcome of races. Substance abuse by jockeys, who are the most visible human participants in the sport, could affect public confidence in the integrity of that sport. While the state's interest in the appearance of integrity reaches all participants, it is obviously greatest with respect to jockeys. The governing equal protection principle is that the state may rationally take one step at a time. *See, e.g., Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 489 (1955)("Or the reform may take one

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Council 82 v. Carey, 737 F.2d 187 (2d Cir. 1984), we decline to follow that decision. That case held unconstitutional random strip and cavity searches of prison employees for contraband. Choice of targets was not made by lot.

step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949)("It is no requirement of equal protection that all evils of the same genus be eradicated or none at all."). Thus we find no merit in the jockeys' equal protection challenge.

C. The Right of Privacy

The jockeys contend that the breathalyzer and urine testing, which involve the collection of medical information, violate their rights of privacy with respect to such information. While both the Supreme Court and this court have recognized a right of privacy in medical information, governmental concerns may support the access to such information where the information is protected from unauthorized disclosure. *See Whalen v. Roe*, 429 U.S. 589, 602 (1977); *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3d Cir. 1980). The Commission's concern for racing integrity justifies its access to the breathalyzer and urinalysis information. The jockeys' concern, therefore, is limited to confidentiality. The jockeys concede that the regulatory amendments concerning confidentiality, proposed while their action was pending and put into effect by the Commission before becoming final, *see* N. J. Admin. Code tit. 13, § 70:14A.11(f) (1985), would satisfy their concerns if the amendments were enforced by an injunction or a declaratory judgment. The district court found no reason to grant declaratory or injunctive relief. We find no abuse of discretion. If the Commission ceases to comply with the proposed confidentiality rules, the jockeys may return to court with a new lawsuit. Their privacy contentions, in the circumstances of this case, are not ripe for adjudication.

Conclusion

We conclude that none of the proffered grounds for reversal of the district court's judgment have merit. The judgment will therefore be affirmed in all respects.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 85-1770

WILLIAM SHOEMAKER, ANGEL CORDERO, JR., WILLIAM HERBERT MCCAULEY, PHILIP GROVE and VINCENT BRACCIOLE,

Plaintiffs,

—v.—

HAL HANDEL, Executive Director of the New Jersey Racing Commission, SAMUEL A. BOULMETIS, Steward Representing NJ Racing Commission, JOSEPH F. PIARULLI, Associate Steward, CARL H. HANFORD, Associate Steward and RICHARD W. LAWRENSON, Associate Steward,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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BROTMAN, District Judge

This is an action under the Civil Rights Act, 42 U.S.C. § 1983, by which plaintiffs seek relief from persons acting under color or authority of state law, who allegedly deprive them of their constitutional rights. Plaintiffs are thoroughbred race horse jockeys who complain that the New Jersey Racing Commission's regulations authorizing breathalyzer and urine tests for alcohol and drug use violate several of their constitutionally protected freedoms. They seek a declaratory judgment and permanent injunction against their enforcement. This court has jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

Plaintiffs moved for a preliminary injunction to enjoin the enforcement of the contested regulations on April 17, 1985, the date they filed this complaint. On April 24, 1985, oral argument was heard on this motion. This court, on May 13, 1985, issued Findings of Fact and Conclusions of law, in which it denied plaintiffs' motion for a preliminary injunction, ordered changes in the medical disclosure forms used, and directed the state to resolve any ambiguities which might exist in the regulations.[1] The court also set an expedited schedule for discovery and a full bench hearing. On June 18, 19, 21 and July 1, 1985, this court heard testimony as to whether a permanent injunction should issue. For the reasons provided below, the court upholds the constitutionality of these regulations.

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1 *Shoemaker v. Handel*, 608 F. Supp. 1151 (D.N.J. 1985).

The following constitute Findings of Fact and are considered true in all respects.

I. *Findings of Fact*

1. Plaintiffs William Shoemaker, Angel Cordero, Jr., William Herbert McCauley, Philip Grove, and Vincent Bracciole are all nationally known thoroughbred race horse jockeys licensed by the State of New Jersey who have won, over their careers, thousands of individual races.[2] Their performances have captured the imagination and loyal following of millions of Americans.

2. Defendants include Hal Handel, the Executive Director of the New Jersey Racing Commission; Samuel A. Boulmetis, a former jockey and presently State Steward and Assistant Stewards Joseph F. Piarulli, Carl H. Hanford, and Richard W. Lawrenson, Associate Stewards, all representing the Racing Commission at the "race meeting" held at Garden State Park, Cherry Hill, New Jersey.

3. Horse racing is a publicly sponsored sport featuring legalized gambling by members of the general public, which, in turn, generates revenue for the state treasury. Its economic impact is broad. When a fire destroyed the Garden State Racetrack in Cherry Hill several years ago, the State Legislature specifically found that it should "be reopened as soon as possible so that economic benefits of an operating track and its attendant service industries will once again flow into the area—and to the State as a whole." N.J.S.A. 5:5-94(c).

4. Jockeys must be in total control of their mental faculties and physical capabilities. Racing requires acute alertness, coordination, skill and reflex ability. The risk of serious injury is apparent considering the speed and number of horses running in a confined area, and is greatly increased if a jockey participates while under the influence of alcohol or controlled dangerous substances.

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2 Grove has won over 3,000 races in 18 years; Bracciole 3,200 races in 15 years; and McCauley 1,200 races in nine years.

5. The court can take judicial notice that alcohol and drug abuse is a serious national problem, which could involve upwards to ten percent of the total population. Recent media attention has focused on this problem as it affects professional and amateur athletes. Dr. Robert Pandina, Associate Professor of Psychology at the Center of Alcohol Studies, testified that the degree of risk of drug abuse among athletes is the same as for the general public. TR, Pandina at p. 9. Unannounced drug screening tests administered to minor legue baseball players have resulted in between five and thirty percent of those tested recording a "positive" for some drug use. *Id.*

6. Raymond Edward Deputy has been the State Steward for the Delaware Harness Racing Commission since 1977. He testified that the Commission has administered breathalyzer tests since 1969 and urine tests since 1982 to harness drivers on a random basis. TR, Deputy at pp. 32-33. Three to five drivers are required to give urine samples each week. The alcohol testing program produces five to six "positives" each year. Over five hundred harness drivers have been tested for drugs. Fully 14.2% of the drivers tested "positive" for drug use. *Id.* at 34.

7. Samuel A. Boulmetis has been the State Steward for the Thoroughbred Racing in New Jersey. He has seen "several" people "drunk" or "high" in the Jockey's Room. However, although Boulmetis served as the State Steward at the Meadowlands in 1984, he did not see any jockey at the track impaired prior to a race during that period. He spent an average of fifteen minutes in the Jockey's Room each night. TR, Boulmetis at pp. 20-21. One year ago, two jockeys were found with cocaine at the race track in New Jersey, TR, Bruce Garland, Deputy Director of the New Jersey Racing Commission, at p. 84.

8. Each jockey which testified, with the exception of McCauley, observed other persons impaired at the race track—"six" for Bracciole, "three" for Grove, and "three or four" for Anthony Samuel Black.

9. A review of the National Association of State Racing Commissions Bulletins reveals that in 1984, eleven jockeys were disciplined in eight states and one Canadian province for involvement with drugs. Garland Affidavit at ¶ 7, citing Letter of Charles K. Bradley, Assistant Deputy Commissioner, N. J. Racing Commission dated January 7, 1985.

10. No evidence has been introduced linking a jockey's drug-related impairment with an accident during a race. One accident in Pennsylvania has been linked to alcohol use by a jockey. The vast majority of racing accidents are caused by injuries to the horses.

11. The New Jersey State Legislature has enacted strict controls over horse racing. N.J.S.A. 5:5-22 *et seq.*[3] It established the New Jersey Racing Commission ("Commission") and vested it with the broad powers necessary to supervise the industry, including the "full power to prescribe rules, regulations and conditions under which all horse racing shall be conducted. . . ." N.J.S.A. 5:5-30. These regulations apply to "all racetracks, all race meetings and all persons and to all matters" within its jurisdiction. N.J.A.C. 13:70-1.1 *et seq.*

12. These regulations apply to jockeys, who are also required to be licensed, and regulates race tracks such as Garden State and Monmouth Parks.[4]

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3 N.J.S.A.5:5-22 provides:

> There is hereby created and established a New Jersey Racing Commission, hereinafter referred to as the commission, which commission shall be vested with and possessed of the powers and duties in this act specified, and also the powers necessary or proper to enable it to carry out fully and effectually all the provisions and purposes of this act. The jurisdiction, powers and duties of the commission herein created and established shall extend under this act to any and all persons, partnerships, associations or corporations which shall hereafter hold or conduct any meeting within the State of New Jersey whereat horse racing shall be permitted for any stake, purse or reward.

4 N.J.S.A. 5:5-37 provides:

> The said commission may designate a steward. . .to serve at any horse race meeting held under a permit issued under this act. . .Such

13. To combat alcohol and drug use at the race track, the Commission promulgated regulations authorizing the use of breathalyzer tests to detect the presence of alcohol in the blood of jockeys, trainers, officials, and grooms, N.J.A.C. 13:70-14A.10, and urinalyses to detect the presence of controlled dangerous substances not authorized by a valid prescription from a physician. N.J.A.C. 13:70-14A.11. (*See* Regulations attached hereto as Appendix A). These regulations were proposed on June 18, 1984, N.J.R. 1457(a), adopted on January 14, 1985, 17 N.J.R. 470, became effective on February 19, 1985, and operational on April 1, 1985, the first day of thoroughbred racing in New Jersey following their adoption. Garland, who has primary responsibility relating to the rules and regulations of the Commission, testified that the purpose of the regulations was three-fold: (1) to promote the Commission's primary goal of increasing the safety of participants in the race, (2) to promote the integrity and public perception of the cleanliness of the industry, and (3) to rehabilitate those who are found to abuse alcohol and drugs.

14. Oral and written notice of the adoption of these rules were provided to all persons affected and to the Jockey's Guild. TR, Garland at p. 44. Notices were posted at the race tracks. Garland Affidavit at ¶ 11. Each jockey who applied for a 1985 license received a package containing a letter from Commission Executive Director Hal Handel, a sample certification form used for the drug test, and copies of the new regulations. *Id.* The Commission announced at its monthly meeting that the effective date of these rules, April 1, 1985. *Id.* On April 1, 1985, a meeting was held at Garden State Park among representatives of the jockeys, the Jockey's Guild, and the Commission, during which the Commission explained the new regulations. *Id.*

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representative. . .shall have full and free access to any portion of the space or enclosure where such horse race meeting is held and shall have such powers and duties as the commission may from time to time delegate to them under the provisions of this act.

15. The Jockey's Guild unsuccessfully sought to have the Commission defer implementation of the new regulations until a court test of their constitutionality could be made.

16. The Commission's breathalyzer rule is modeled after the harness breathalyzer rule in effect since 1969. TR, Garland at p. 44. It provides as follows:

> Officials, jockeys, trainers and grooms shall, when directed by the State Steward, submit to a breathalyzer test and if the results thereof show a reading of more than .05 percent of alcohol in the blood, such a person shall not be permitted to continue his duties. The stewards may fine and suspend any participant who records a blood alcohol reading of .05 percent or more. Any participant who records a reading above the prescribed level on more than one occasion shall be subject to expulsion, or such penalty as the stewards may deem appropriate.

N.J.A.C. 13:70-14A.10.

17. Jockeys are required to take the breathalyzer tests daily. TR, Garland at p. 44. Grooms, trainers, and officials are tested with less frequency. *Id.*; TR, Boulmetis; Grove at p. 108; McCauley at p. 80.

18. The breathalyzer apparatus is set up in or near the Jockey's Room and is run by an operator. The test is painless. The testee steps up to the machine and breathes. The machine reads the level of blood alcohol and indicates a "positive" reading by means of a red light that is visible to other persons in the room. TR, McCauley at p. 57; Black at p. 107; Grove at p. 106.

19. The Breathalyzer regulation does not expressly provide procedures to preserve the confidentiality of the results of the tests nor the privacy of its administration. N.J.A.C. 13:70-14A.10. The Commission prefers to administer the tests in private.

20. The penalties for violations of the breathalyzer regulation include fines, revocation or suspension of license, and expulsion from racing in New Jersey. N.J.A.C. 13:70-31.1.[5] Any person disciplined under the regulation may apply to the Commission and receive a hearing.[6]

21. Since April 1, 1985, the thoroughbred racing breath tests have resulted in five positives at Monmouth and Garden State Parks—four for officials and one for a jockey. TR, Garland at

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5 The applicable range of penalties for violations of the Commission's rules and regulations are codified at N.J.A.C. 13:70-31.1, and provide:

> (a) The penalties for violation of the law, the rules and regulations or the directives of the commission shall be as follows:
>
> 1. Denial, revocation or suspension of license;
>
> 2. Monetary fines not exceeding $5,000 for each violation. The stewards may not impose directly a fine in excess of $500.00;
>
> 3. Suspension from one or more activities at one or more race tracks;
>
> 4. Expulsion from racing in New Jersey;
>
> 5. Forfeiture of purse;
>
> 6. In addition to the foregoing, the commission may impose as a condition to licensing such conditions as it shall deem appropriate to secure compliance with the rules, regulations and directives of the commission.
>
> (b) The penalties provided above, where applicable, shall be extracted from all persons and/or associations, whether licensed by the commission or not.

6 N.J.A.C. 13:70-13A *et seq.* provides the procedures for a hearing. Any person disciplined by the steward of the Commission's officials for violations of the statute or regulations adopted thereunder may appeal to the commission and request a hearing. N.J.A.C. 13:70-13A.1. Hearings before the Commission and the stewards are *de novo* proceedings and include notice and an opportunity to be heard. N.J.A.C. 13:70-13A.3. The Commission may impose directly any disciplinary actions authorized by its rules and regulations. N.J.A.C. 13:70-13A.2. The Commission must act on all appeals "in accordance with the laws of the State of New Jersey and the rules and regulations promulgated by the Commission." N.J.A.C. 13:70-13A.5.

p. 58. The harness breath test has also produced some positives each year since 1969, although in recent years they have been limited to one or two. Garland Affidavit at ¶ 5; TR, Garland at p. 57.

22. Jockeys must submit to a post-race urine test "at the direction of the State Steward in a manner prescribed by the New Jersey Racing Commission." N.J.A.C. 13:70-14A.11(b). This test is designed to ensure that the jockeys are not under the influence of any "controlled dangerous substances" or "prescription legend drugs" unless obtained by prescription from a doctor and disclosed to the Commission. *Id.* at 11(a).

23. The Commission has implemented the regulation as follows: The names of all participating jockeys at a given "race meeting" are placed in an envelope. The steward or his representative draws the names of three to five jockeys for testing. A representative of the Jockey's Guild is invited to supervise the selection of names. The Commission has stated that it may alter the number of jockeys tested per night. TR, Garland at pp. 42-43.

24. The jockeys whose names are selected must provide the sample after their last race that day. The jockey is given a plastic container for this purpose. He fills out a certification form (*See* Certification Form attached hereto as Appendix B) which asks questions concerning the use of prescriptive and nonprescriptive medications. The purpose of the certification form is to provide an exception for use of controlled dangerous substances pursuant to a valid prescription from a licensed physician.

25. The state represents that the jockeys do not have to complete the portion of the form labeled "For Treatment Of," which asks them to disclose the illnesses that the drugs identified treat. Consistent with this representation, the court ordered the Commission to insert the word "Optional" next to the "For Treatment Of" section so as to make the state's policy clear. *Shoemaker, supra*, at 1160-61. The state has complied with the court's order.

26. The certification forms contain two identical numbers. One number is removed and placed on top of the sample and then sealed with the urine specimen. The sample has no other identifying markings. The sample is then sent to the laboratory for overnight testing. The remaining portion of the form is sent to the Executive Director of the Commission and stored in a safe at his office. When the laboratory results are sent to the Executive Director, he determines who had a positive test by matching the numbers. The actual test results, the certification forms, and any other materials generated by this rule are stored in a safe at the Commission and are available only to the Executive Director or his designee and the Commissioners of the New Jersey Racing Commission. Garland Affidavit at ¶ 9(c).

27. The tests results are confidential and will not be supplied to any law enforcement agency, including the New Jersey State Police. Garland Affidavit at ¶ 9(b). The New Jersey Division of Criminal Justice has issued an Advisory Opinion in which it voices no objections to the regulations, is unaware of any statute which would require the Racing Commission to report suspected drug to prosecutorial authorities and that mere use of Controlled Dangerous Substances is not a crime, but a disorderly persons offense. Garland Affidavit at ¶ 8. The regulations provide only for civil administrative penalties. The Commission would stop testing immediately if the state sought to use the information obtained for a criminal investigation or prosecution. TR, Garland at p. 88.

28. If a positive result is engendered for an individual without a prescription, the Executive Director must follow the steps outlined in the rule.

29. For a first violation, the jockey receives a written reprimand and warning that he will be subject to mandatory drug testing for a period of time on a daily basis and that any further violations will result in sanctions as specified in the regulations. The procedures for administering the test will be the same during the mandatory period as with the regular testing program. *See* N.J.A.C. 13:70-14A.11(d)(2).

30. For a second violation, the jockey must enroll in a Supervisory Treatment Program approved by the Commission, and may continue to participate in racing unless such participation is deemed, by the Executive Director or his designee "to be detrimental to the best interests of racing." Failure to comply with this directive shall subject the jockey to the full range of penalties authorized by N.J.A.C. 13:70-31-1, including fines and expulsion. N.J.A.C. 13:70-14A.11(d)(3).

31. For a third or any subsequent violation, the jockey shall be subject to the penalties in N.J.A.C. 13:70-31-1. He may enroll in the Supervisory Treatment Program only in lieu of these penalties with the approval of the Commission. N.J.A.C. 13:70-14A.11(d)(4).

32. The results of the urine test are confidential except for their use with respect to a ruling issued pursuant to the urine test rule or for use during the appeals process. Any individual contesting the tests or test results may have a hearing regardless of whether it constitutes his first, second, or third violation.

33. On May 24, 1985, the Commission proposed amendments to the urine testing regulation. (*See* Amendments attached hereto as Appendix C). A public comment period and formal adoption must follow. TR, Garland at p. 49. The Commission seeks to widen the scope of the rule by testing—in addition to jockeys—officials, trainers, and grooms. N.J.A.C. 13:70-14A.11(c), (c) and (d) (proposed). The confidentiality guidelines will be expressly broadened to include any and all information obtained pursuant to the rule. No disclosure of these materials could be made without the approval of the Executive Director of the Commission or his designee. N.J.A.C. 13:70-14A.11(e) (proposed). The Commission would store any information and reports collected for up to a year, after which they would be destroyed. An exception is provided to permit the Commission to maintain records for those "who have violated this rule" without time limit, for the purpose of recording "the number of violations and the results of supervisory treatment and for use should future violations occur." N.J.A.C. 13:70-14A.11(f) (proposed).

34. The Commission is preserving the confidentiality of all information collected under the urine test rule as if the proposed amendments had already been adopted.

35. A jockey may be required to provide a urine sample a maximum of three times within a seven day period. Should a jockey's name turn up in excess of three times, the steward disregards the selection and draws another name. Jockeys subject to mandatory testing due to past violations are not included in this group. At Garden State Park, no rider was selected more than three times in the fifteen day period. TR, Boulmetis at p. 12. At Monmouth Park, plaintiffs McCauley and Bracciole were tested three times within a twenty-four hour period. *Id.*

36. Many jockeys have been unable to provide urine samples when requested. Jockeys "reduce," or lose weight quickly, by eliminating excess bodily fluids so as to lighten the load the horse must carry during the race. This lessens their ability to provide post-race urine samples. TR, Boulmetis at p. 11.

37. The Commission has detained jockeys unable to give urine samples for up to an hour. If the steward determines that a jockey is unable to provide a sample, he is excused and retested the next day he participates, or on a day he is not reducing so heavily. If a jockey leaves without giving a sample or being excused, the state steward contacts him and gives him a hearing. Failure to follow procedures as mandated by the urine test rule can subject jockeys to the penalties provided in N.J.A.C. 13:70-31-1. In one case, a steward fined a jockey for failing to provide a urine sample and for leaving the race track without being excused. Tr, Garland at p. 47.

38. "Positive" test results may measure not only use of drugs at the race track, proximate to race time, but private use of drugs, off regulated premises. For example, marijuana may engender a positive test result even though a jockey did not use it for a week prior to the race and is not presently impaired. The state is using "special procedures" for evaluating positive tests results indicating marijuana use. TR, Garland at p. 55.

39. The State of Delaware has had a drug testing program for its harness racing drivers since 1982. It uses a spot-check "EMIT" test, which is administered on a random basis. If a test result is positive, the sample is taken for a full laboratory analysis overnight. Over 500 harness drivers have been tested under this program. Approximately 14.2% of the samples have turned out positive for drug use. TR, Deputy at p. 34.

40. The Delaware Harness Racing Commission found that the average age for positive test results was 26. Delaware began to test more heavily in this age group. As a result, the number of positive tests has increased to 18.2% of the total number of tests. *Id.*

41. Since April 1, 1985, the New Jersey thoroughbred racing urine tests have resulted in one positive for cocaine use by a jockey. Two harness drivers in New Jersey have tested positive for cocaine.

42. The Commission chose to implement the urine tests in this manner in order to maximize their value as a deterrent, to promote the public's perception of the industry's ability to regulate itself, to reduce the adversarial nature of the test by treating all jockeys equally, and because jockeys would be reluctant to report or confront peers whom they suspected of being impaired. TR, Boulmetis at pp. 6-7. The jockeys testified that they had sufficient incentive to police themselves, given, that they too, would be riding alongside the impaired person and could be subject to increased risk of a serious accident.

43. The jockeys believe that the urine tests, as administered, unfairly single them out as a group and encourage the public to infer that they use controlled dangerous substances at the race track. They testified that all impaired persons who had access to horses—including owners, trainers, grooms, and the gate crew—posed a risk of serious injury to the participants and should be tested. The state argues that it selected only jockeys for urine testing because of the heightened chance for accidents during the running of a race. TR, Boulmetis at p. 25.

II. *Conclusions of Law*

Plaintiffs allege that N.J.A.C. 13:70-14A.10 and 14A.11 violate their rights guaranteed by the Fourth, Fifth, and Ninth Amendments and the Due Process and Equal Protection Clauses of the United States Constitution. Specifically, plaintiffs argue that the regulations:

(a) subject jockeys to unreasonable searches and seizures in violation of the Fourth Amendment;

(b) fail to provide a hearing during which plaintiffs can challenge the results of the breathalyzer and urine tests in violation of the due process clause of the Fourteenth Amendment;

(c) discriminate against jockeys as a group by singling them out for breathalyzer and urine testing in violation of the equal protection clause of the Fourteenth Amendment; and

(d) require the disclosure of private medical information, potentially relevant to violations of the criminal law of the State of New Jersey, without adequate safeguards for maintaining its confidentiality in violation of their privacy rights under the Fourteenth Amendment.

The court will address the plaintiffs' claims *seriatim*.

A. *Search and Seizure Claim*

Plaintiffs argue that because the regulations allow the administration of the breathalyzer and urine tests without some degree of individualized suspicion, they are unreasonable under the Fourth and Fourteenth Amendments.

The Fourth Amendment provides that:

> The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly

describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.[7]

Defendants argue that Fourth Amendment considerations are not implicated in this case because any searches made pursuant to the Commission's policy would not be used in any criminal investigation or prosecution and are merely conditions of licensure. This contention is without merit. "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behaviour." *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967). All of us are protected by the Fourth Amendment all of the time, not just when the state suspects us of criminal conduct. *McDonell v. Hunter*, Civ. No. 84-71B, Slip op. at 4 (S.D. Iowa, Vietor, C.J.). Likewise, licensure is merely a factor which must be included in the court's evaluation of the constitutionality of a search.

The Fourth and Fourteenth Amendments are implicated in this case because the detaining and testing of an individual for the use of alcohol by means of a "breathalyzer" test and use of controlled dangerous substances by means of a "urinalysis" are searches within the meaning of these amendments. *See Storms v. Coughlin*, 600 F. Supp. 1214, 1218 (S.D.N.Y. 1984). These two tests are essentially indistinguishable from blood tests, which have been held by the Supreme Court to "plainly constitute searches of 'persons,' and depend antecedently upon the seizures of 'persons,' within the meaning of that Amendment." *Schmerber v. California*, 384 U.S. 757, 767 (1966). All three searches involve the forced extraction of bodily fluids—albeit by different means. *Storms*, *supra*, 600 F. Supp. at 1218. Breathalyzer and urine searches implicate the interests in human dignity and privacy found to be at stake in *Schmerber*.

It is well settled that the Fourth Amendment protects people, not places, *Terry v. Ohio*, 392 U.S. 1, 9 (1968); *Katz v. United*

7 The Fourth Amendment is enforceable against the states through the fourteenth amendment. *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967); *Ker v. California*, 374 U.S. 23, 30 (1963).

States, 389 U.S. 347, 351 (1967); *SEC & Law Enforcement Emp. District Council 82 v. Carey*, 737 F.2d 187, 200–01 (2nd Cir. 1984), and prohibits only unreasonable searches. *Carroll v. United States*, 267 U.S. 132, 147 (1925). The Fourth Amendment vests individuals with the right to be free from "unreasonable government intrusions into their legitimate expectations of privacy." *United States v. Chadwick*, 433 U.S. 1, 7 (1977); *SEC & Law Enforcement Emp., supra*, 737 F.2d at 200–01. *See also Bell v. Wolfish*, 441 U.S. 520, 558–59 (1979).

Regulatory officials, as government agents, must act reasonably in their discretion, thereby safeguarding "the privacy and security of individuals against arbitrary invasions. . . ." *Marshall v. Barlow's Inc.*, 436 U.S. 307, 312 (1978), *quoting Camara v. Municipal Court*, 387 U.S. 523, 528 (1967); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). As the Supreme Court has held,

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need of the particular search against the invasion of personal rights that the search entails.

Bell v. Wolfish, supra, 441 U.S. at 559; *Illinois v. Lafayette*, 462 U.S. 640 (1983); *United States v. Villamonte-Marquez*, 462 U.S. 579 (1983); *Prouse, supra*, 440 U.S. at 654; *SEC & Law Enforcement Emp., supra*, 737 F.2d at 201. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. *Bell v. Wolfish, supra*, 441 U.S. at 559.

Under the first prong of the reasonableness test, the intrusion must be viewed in the context of a jockey's legitimate expectation of privacy. Justice Harlan provides the test for determining whether an expectation of privacy is legitimate in *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring): "[T]here is a twofold requirement, first that a person have established an actual (subjective) expectation of

privacy, and second, that the expectation be one that society is prepared to recognize as 'reasonable.' " *Id.*

First, the warrantless administration of breathalyzer and urine tests to jockeys at the race track, proximate to race time does not, *per se*, violate the Fourth and Fourteenth Amendments. Although the Fourth Amendment generally requires a warrant based on probable cause issue before a search occurs, *Terry, supra*, 392 U.S. at 28, exceptions exist to this requirement when a legitimate governmental purpose makes the intrusion into privacy reasonable. *SEC & Law Enforcement Emp., supra*, 737 F.2d at 203. The state may conduct administrative warrantless searches when "necessary to further a regulatory scheme and the . . . regulatory presence is sufficiently comprehensive and defined. . . ." *Donovan v. Dewey*, 452 U.S. 594, 600 (1981). It is the pervasiveness and regularity of the regulatory scheme that ultimately determines whether a warrant is necessary to render an inspection program reasonable under the Fourth Amendment. *Id.* at 606.

Warrantless administrative searches of commercial property have been found constitutional for firearms, *United States v. Biswell*, 406 U.S. 311 (1972), and liquor, *Colonnade Catering Corp. v. United States*, 397 U.S. 72–77 (1970), but not under the Occupational Health and Safety Act (OSHA). *Marshall, supra*. The *Biswell* and *Colonnade* cases:

> represent responses to relatively unique circumstances. Certain industries have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise . . . when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of government regulation.

Marshall, supra, at 313.

The New Jersey courts have consistently considered horse racing and casino gambling as demonstrating the same pervasive regulatory factors as liquor and firearms. *Delguidice v. New Jersey Racing Commission*, No. A-126, slip op. at 15–16 (N.J. July 17, 1985) (Clifford, J.); *State v. Dolce*, 178 N.J.

Super. 275, 283-85 (App. Div. 1981); *In re Martin*, 90 N.J. 295, 313 (1982). A New Jersey court recently equated horse racing, casino gambling, and liquor as follows:

> Liquor, with "its inherent evils," has been dealt with as a subject apart." *Grand Union Co. v. Sills*, 43 *N.J.* 390, 398 (1964). The legislative power to regulate such a "nonessential and inherently dangerous commodity," as a wholly constitutional expression of concern for public health, safety, morals or general welfare, has been said to be almost without limit. *Id.* at 403-404. Horse racing, with attendant legalized gambling, "strongly affected by a public interest," has been held to be a "highly appropriate" subject for close regulatory supervision, *Jersey Downs, Inc.v. N.J. Racing Comm'n*, recognized as desirable for many years, *Niglio v. N.J. Racing Comm'n*, 158 *N.J. Super.* 182, 188 (App. Div. 1978). We see every reason, including those expressed in N.J.S.A. 5:12-1b, for legalized casino gambling to take its desired place among those industries.

In re Boardwalk Regency Casino License Application, 180 N.J. Super. 324, 341 (App. Div. 1981).

The public has a special interest in the strict regulation of horse racing. This industry has always been pervasively regulated, in order to minimize the criminal influence to which it is so prone. *Delguidice, supra*, at 16; *Garifine v. Monmouth Park Jockey Club*, 29 N.J. 47, 55 (1959); *Dolce, supra*, 178 N.J. Super. at 284-85; *Dare v. State*, 159 N.J. Super. 531, 537 (1978); *Niglio v. New Jersey Racing Commission*, 158 N.J. Super. 182, 188 (App. Div. 1978); *Jersey Downs, Inc. v. N.J. Racing Commission*, 102 N.J. Super. 451, 457 (App. Div. 1968); *State v. Garden State Racing Association*, 136 N.J.L. 173 (E&A 1947).

As the New Jersey Supreme Court has held,

> The danger of clandestine and dishonest activity inherent in the business of horse racing has been well recognized

> . . . Corruption in horse racing activities is regarded as an affront to a publicly sponsored sport with the potential of far reaching consequences.
>
> It was doubtless with these important considerations that the legislature gave the Racing Commission full regulatory power over horse racing in this state. *Dolce*, *supra*, 178 *N.J. Super.* at 285, *N.J.S.A.* 5:5-22 to 5:5-109. In particular, the Racing Commission is empowered to prescribe the rules, regulations, and conditions under which all horse races are conducted, *N.J.S.A.* 5:5-30, and to regulate the licensing of those connected with horse racing, *N.J.S.A.* 5:5-33.

Delguidice, *supra*, slip op. at 15-16. The Legislature has granted the Commission the specific power to "revoke or refuse to issue a license if in the opinion of the Commission the revocation or refusal to issue such license is in the public interest." *Delguidice*, *supra*, slip op. at 16; N.J.S.A. 5:5-33; *Dare*, *supra*, 59 N.J. Super. at 537.

In this instant action, the court is asked to approve warrantless searches of persons on regulated property, not merely the regulated property itself. *See, e.g.*, *Biswell* (search for firearms); *Colonnade* (search for liquor). However, the same considerations behind the exception to the warrant requirement are equally applicable to searches of licensed persons, such as jockeys while they are on the regulated premises, such as race tracks. *See Martin*, *supra*, 90 N.J. at 295 (New Jersey Supreme Court has upheld the constitutionality of warrantless searches of the "person and personal effects" of licensed casino employees at licensed casinos).[8] The court found that:

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8 N.J.S.A. 5:12-79(a) (6) specifically provides:

> The division and its employees and agents, upon approval of the director, shall have the authority, without notice and without warrant . . . [t]o inspect the person, and personal effects present in a casino facility licensed under this act, of any holder of a license issued pursuant to this act while that person is present in a licensed casino facility.

> [t]he expectation of privacy in such circumstances is limited, particularly where the applicant has been notified prior to licensing that she will be subject to warrantless searches in the casino facility.

Id. at 314.

The court has applied the reasonableness test and has weighed the legitimate government interest in maintaining the integrity of the racing industry and the safety of the sport against the legitimate expectations of privacy retained by jockeys and finds that the breathalyzer tests, as administered under the regulations, are reasonable in the absence of a warrant.

However, warrantless searches themselves are also subject to the independent requirement of reasonableness and must further the statutory purposes and regulatory scheme. *Martin*, *supra*, 90 N.J. at 314, n.9. Whether a search is conducted in an unreasonable manner is a matter to be determined in light of the circumstances of the particular case. *Id.* The critical issue which must be decided—and the most vigorously contested issue between the parties—is whether the warrantless searches administered here—in the absence of any individualized suspicion—are constitutional. The court finds that they are.

To accommodate public and private interests, some quantum of individualized suspicion is usually a prerequisite to a constitutional search and seizure. *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976). However, such a requirement is not absolute. As the Supreme Court has held:

> In those situations in which the balance of interests precludes insistence upon "some quantum of individualized suspicion," other safeguards are generally relied upon to insure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field."

Prouse, *supra*, 440 U.S. at 654-55, *quoting Camara*, *supra*, 387 U.S. at 532. "Standardless and unconstrained discretion" is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be

circumscribed, at least to some extent." *Prouse*, *supra*, 440 U.S. at 661. *See also, Marshall*, *supra*, 436 U.S. at 320–21. These safeguards include a showing of the legitimate purpose and reasonableness of the procedures followed and the degree to which they minimize the intrusion on the privacy interests of the individual searched. *See, e.g., Martinez-Fuerte*, *supra*, 428 U.S. at 562 (warrantless automobile searches for illegal aliens without any individualized suspicion are constitutional at reasonably located checkpoints). *Cf. Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) (random searches by border patrols are unconstitutional without a warrant and in the absence of probable cause).

Likewise, the intrusiveness of the search must also be considered. While the Supreme Court has refrained from drawing bright lines among searches, breathalyzer tests and urinalysis are considered less intrusive than body cavity and strip searches. *See Schmerber*, *supra*; *United States v. Ramsey*, 431 U.S. 606, 618 n.1 (1976); *United States v. Des Jardins*, 747 F.2d 499, 504–05 (9th Cir. 1984). Body cavity and strip searches are considered among the most intrusive of searches and are usually unconstitutional without a showing of a reasonable suspicion of wrongdoing prior to their utilization. *SEC & Law Enforcement Emp.*, *supra*, 737 F.2d at 202–03; *McDonell*, *supra*, slip op. at p. 5. In *SEC & Law Enforcement Emp.*, the Second Circuit held that the administration of visual body cavity and strip searches of prison employees for contraband were unconstitutional in the absence of individualized suspicion. In reaching this conclusion, the court recognized the uniqueness of the correctional institutions involved, the deference traditionally afforded prison administrators by the courts, the legitimate governmental interest in the maintenance of the stability, security, and order of its penal institutions, and a corrections officer's diminished expectations of privacy while at work in a penal institution. These interests were balanced against the diminished expectation of privacy held by the prison's employees. *SEC & Law Enforcement Emp.*, *supra*, 737 F.2d at 205; *see also McDonell*, *supra*, slip op. at pp. 5–7.

In *McDonell*, the District Judge also determined that prison employees could not be forced to submit to blood, urine, and breath tests in the absence of a reasonable suspicion of drug and alcohol use at the facilities. *Id.* As a condition of employment, plaintiff signed a paper allegedly "consenting" to such searches. He was informed that supervisory personnel at the prison had received "confidential information" indicating he had been seen the previous weekend with individuals who "were being looked at" by law enforcement officials regarding drug related activities. The supervisor asked him to undergo a urinalysis. Plaintiff refused and was terminated. Shortly thereafter, he was reinstated and transferred to another facility. The department's policy did not identify who had authority to require such a search, nor did it articulate any standards for its implementation. Defendants argued that such testing was reasonable (1) to identify possible drug smugglers, and (2) because it is undesirable to have drug users employed at correctional institutions. The State failed to persuade the court that the searches reasonably furthered its interests in the absence of reasonable suspicion of wrongdoing:

> The possibility of discovering who might be using drugs and therefore, might be more likely than others to smuggle drugs to prisoners is far too attenuated to make seizures of bodily fluids constitutionally reasonable . . . No doubt most employers consider it undesirable for employees to use drugs, and would like to be able to identify any who use drugs. Taking and testing body fluid specimens, as well as conducting searches and seizures of other kinds, would help the employer discover drug use and other useful information about employees. There is no doubt about it—searches and seizures can yield a wealth of information useful to the searcher . . . That potential, however, does not make a governmental employer's search of an employee a constitutionally reasonable one.

Id. at p. 7.

McDonell is clearly distinguishable from this instant action on the basis of the evidentiary showing made by the state. The potential for harm here is real—not attenuated. *Shoemaker* differs from *McDonell* precisely because the state has made a sufficient and convincing showing of the need to conduct breathalyzer and urine tests in the absence of any individualized suspicion. First, the court recognizes that horse racing is one of a special class of relatively unique industries which have been subject to pervasive and continuous regulation by the state. *See, e.g., Biswell, supra* (firearms); *Colonnade, supra* (liquor); *Delguidice, supra* (horse racing), and *Martin, supra* (casino gambling). It is a publicly sponsored sport which features legalized gambling on races by the general public, which, in turn, raises revenue for the state treasury. Horse racing is tolerated only under the most controlled of circumstances.

Second, jockeys are licensed by the state and have received ample notice of the regulations. Licensure and notice do not, *per se*, constitute a waiver of plaintiffs' Fourth Amendment rights. However, they are factors which must be considered in balancing the strength and merit of the competing interests. As the jockeys admit, licensed participants in an industry subject to strict oversight have a diminished expectation of privacy. Jockeys must accept the unique benefits and burdens of their trade, which includes submission to inspections which reasonably further legitimate state interests. In order to keep the horse racing industry clean and safe, the state has given the Racing Commission the broadest regulatory powers, and the Commission may revoke the license of a jockey if it finds that the public interest will be served. Under these circumstances, the court finds that jockeys have significantly diminished expectations of privacy while engaged in licensed activities on regulated premises, such as race tracks. Society, likewise, has consistently recognized this to be so.

Third, the state has a vital interest in ensuring that horse races are safely and honestly run and that the public perceives them as so. Safe racing promotes the "integrity" of the

industry. The state has narrowly tailored and drafted its regulations so as to promote these interests directly. It is clear that horse racing is a highly dangerous sport where injury to participants is commonplace. A jockey must be in full possession of his mental faculties and physical capabilities—his coordination, skill, and reflex ability are critical to good performance. The risk of serious injury is apparent, given the speed and closeness with which large numbers of horses run during a race. Even the slightest decrease in alertness and reflex ability increases the danger of accidents, including multiple horse and jockey accidents causing grave injury and death. In this context, even a single jockey impaired by alcohol and drug use, and participating in several races that evening, will ride proximate to dozens of jockeys and increase the probability that all may be injured.

While the state has introduced little evidence linking accidents with jockeys impaired by alcohol or drugs—only one accident at a race track in Pennsylvania—the court does not believe that this should be the critical and only factor in the analysis. The state has shown that jockeys have been found in impaired states at the race track in sufficient numbers to indicate a high probability that the testing program will either uncover such use or deter it and thereby prevent accidents. Several jockeys testified to observing their peers impaired by drugs or alcohol at the race tracks—Bracciole saw six impaired jockeys, Black saw three or four, and Grove saw three. Only McCauley did not recall observing a jockey in an impaired state at the track. State Steward Boulmetis, a former jockey, testified that he, too, had seen "several" jockeys impaired at the race track. Within the last year, eight states and one Canadian province disciplined eleven jockeys on drug related problems. In New Jersey, one thoroughbred jockey tested positive for alcohol and one for cocaine since April 1, 1985. The New Jersey harness testing program generated one positive for alcohol and two for cocaine. In Delaware, the Harness Racing Commission's random alcohol and drug testing program has generated five to six positives for alcohol annually,

and fully *14.2 percent* of all tests—nearly one in seven—as positives for drugs. Delaware discovered that the prime age for drug use averaged around twenty-six. When Delaware began testing this age group more frequently, the number of positives increased to 18.2% of the total tested. There is no evidence in the record to suggest that New Jersey thoroughbred race horse jockeys are any less likely than Delaware harness race horse drivers to use drugs and/or alcohol. If anything, the lower numbers generated by the New Jersey tests over the last three months suggest that New Jersey's greater frequency of testing is serving as an effective deterrent.

Plaintiffs have argued that the regulations, on their face, give the state steward "unfettered discretion" in selecting jockeys for the drug and breath tests. The state has chosen to describe its testing procedures as "random" based. However, they are not random in the sense that they allow the state steward unlimited discretion in selecting testees. The regulations, as administered by the Commission, strip the stewards of any such discretion. The fair characterization of these tests is that they are administered neutrally, with procedural safeguards substituting for the lack of any individualized suspicions. All jockeys are treated equally. The state's program requires that *all* jockeys submit to breathalyzer tests. Further, every jockey participating in racing on a given evening has an equal chance of being selected to give a urine sample under the name drawing system. The state reserves the right solely to vary the total number of jockeys tested at each race meeting from three to five.

There is considerable evidence that a testing approach which requires some element of individualized suspicion would actually *increase* the ability of the steward to act in an arbitrary and unreasonable manner by enabling him to select jockeys for testing without any clearly defined and objective behavioral criteria for detecting impairment. Given that jockeys often would be singled out for testing as a result of their behavioral manifestations, this testing procedure would prove considerably more adversarial and subject to abuse over the long term. Finally, the testing regimen administered by the Commission

serves as the broadest and most effective deterrent. In the jockeys' close community, peer pressure would otherwise prevent many from identifying riders who might be impaired. Likewise, jockeys cannot escape detection by masking their symptoms.

The regulations also provide solely for civil administrative penalties, which might include fines, and suspension or expulsion from racing in New Jersey. They promote the rehabilitation of jockeys through treatment programs. The State's Division of Criminal Justice has advised the Racing Commission that it will not seek to use or obtain information gathered pursuant to these regulations, knows of no statute or regulation which requires the Commission to turn over any information it obtains under these rules to criminal enforcement authorities, and that the use of controlled dangerous substances is not a crime—only a disorderly persons offense. The regulations provide for testing only on licensed premises—race tracks—proximate to race time.

The jockeys argue that the urine tests measure more than just impairment at the race track. Previous private use of certain drugs, off race track premises, may generate a "positive" result without any indication of a jockey's present impairment. The court finds that the state has been sufficiently careful in implementing its testing procedure so as to guard against false positives which might serve to punish jockeys for their private behavior off regulated premises. First, any positive test is checked against the certification form for valid drug use, pursuant to a prescription from a physician. Second, only a significant drug presence will generate a positive reading. Third, the state is using special procedures to guard against misinterpretation of positives for marijuana use, given that metabolites signifying such use may remain in the urine for weeks. Fourth, a jockey can request a hearing to fight the tests, test results, and the imposition of any penalties he believes wrongfully administered under the regulations. Given the public interest in clean, safe racing, the ability of the Racing Commission, under its broad statutory mandate, to revoke any

license "in the public interest," and the availability of penalties which affect only a jockey's status to race in the State of New Jersey and fines, the court finds the procedures used sufficient to protect the jockeys' interests.

Finally, jockeys "reduce," or lose weight quickly to lighten their load during a race. As a result, several jockeys have been unable to provide post-race urine samples. The state has excused those jockeys unable to provide a sample within a reasonable period, and in all circumstances, less than one hour. A jockey is penalized only if he leaves without being excused. The court finds this procedure reasonable so long as the period of time in which a jockey must wait to give a sample is a minimal one.

Under the circumstances presented in this case, the court is persuaded that the breathalyzer and urine regulations, as administered by the Commission, do not violate plaintiffs' right to freedom from unreasonable searches and seizures.

B. *Due Process Claim*

Plaintiffs allege that the regulations violate the Due Process Clause of the Fourteenth Amendment because they do not expressly provide a hearing at which they can challenge the results of the tests or any penalties imposed. The court disagrees. First, a license to race is a property interest. *See Niglio*, *supra*, 158 N.J. Super. at 189-90. The United States Supreme Court has consistently held that some form of hearing is required before an individual is finally deprived of his property interest. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1975); *Wolff v. McDonell*, 418 U.S. 539, 557-58 (1974). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews*, *supra*, 424 U.S. at 333; *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *see Grannis v. Ordean*, 234 U.S. 385, 394 (1914). Due process is flexible and calls for such procedural protections as the particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

The court finds that plaintiffs are entitled to a hearing to challenge the results of any test administered under the breathalyzer and urine test rules or any penalty imposed therein. N.J.A.C. 13:70-13A.1 provides for such a hearing "[w]hen any person is disciplined by the stewards or any official representing the Commission pursuant to the laws of New Jersey or rules of the Commission." The court finds that the procedures as provided are attenuated by all of the constitutional and statutory safeguards inherent in the requirement of due process. Therefore, the court finds no deprivation of plaintiffs' constitutional right to due process under law.

C. *Equal Protection Claim*

Plaintiffs allege that the regulations violate the Equal Protection Clause of the Fourteenth Amendment because (1) only jockeys are subject to urine testing and (2) while jockeys, trainers, officials, and grooms are subject to breathalyzer testing, only jockeys and officials are so tested.

An individual has no fundamental right to be a jockey. New Jersey may, at its option, bar horse racing within the state entirely. Likewise, jockeys do not comprise a "suspect class" such as categorizations based upon race, national origin, religion, alienage, and gender. Therefore, the state's testing program need bear only some "rational relationship" to legitimate state purposes. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 40, *reh'g denied*, 411 U.S. 959 (1973). Perfection in making a classification "is neither possible nor necessary." *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 314 (1976). The regulatory classification may be invalidated only if it manifests arbitrary discrimination between persons similarly situated. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461-66 (1980).

The court finds that the classification scheme adopted by the Commission is rational and clearly furthers the state's interest in maintaining the safety of the racing industry. Safety concerns are greatest during the running of the race, when the most serious accidents can occur. For the same reason, it is

reasonable that the state would use its limited resources to test jockeys for alcohol impairment with greater frequency than grooms and trainers. The court finds that these regulations, on their face and as administered, do not violate plaintiffs' rights to equal protection under law.

D. *Privacy Claim*

Plaintiffs argue that the regulations violate their constitutional right to privacy. Their claim is three-fold. First, they assert that the Commission does not have sufficient justification to require jockeys to disclose their use of prescription and other non-prescription medications, as required by the certification form. Second, they contend that even if the Commission can require disclosure of this information, the regulation does not provide adequate safeguards against its public disclosure. Likewise, plaintiffs assert that the regulation does not sufficiently provide for the safe storage, timely destruction, and confidentiality of all information obtained pursuant to the drug testing rule. Third, they argue that the results of the breathalyzer tests are not protected by any confidentiality or disclosure guidelines, and that testing in a non-private setting is impermissible.

The Supreme Court has recognized a "right to privacy" founded on the Fourteenth Amendment's concept of personal liberty. *Whalen v. Roe*, 429 U.S. 589 (1977). The extent and full breadth of the right to privacy has never been fully delineated. However, the relevant case law can be summarized as follows:

> The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.

Whalen v. Roe, supra, 429 U.S. at 598-600; *Barry v. City of New York*, 712 F.2d 1554, 1558 (2nd Cir. 1983). These two interests have been characterized by the Fifth Circuit as in-

terests in "confidentiality" and in "autonomy" respectively. *Plante v. Gonzalez*, 575 F.2d 1119, 1128 (5th Cir. 1978), *cert. denied*, 439 U.S. 1129 (1980). The interest in autonomy has encompassed matters relating to marriage, procreation, contraception, family relationships and child rearing and education. *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 577 (3rd Cir. 1980), *quoting Paul v. Davis*, 424 U.S. 693, 713 (1976). This instant action implicates the interest in confidentiality. The right to privacy has been held to extend to the "individual interest in avoiding disclosure of personal matters." *Whalen v. Roe*, *supra*, 429 U.S. at 599-600, 606.

The right to privacy is not absolute. The state has the power to compel disclosure of otherwise private information when its interest in the information outweighs the individual's interest in non-disclosure. *Plante*, *supra*, 575 F.2d at 1134. The Third Circuit has articulated several factors which must be considered in evaluating the competing interests:

> the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating towards access.

Westinghouse, *supra*, 638 F.2d at 578.

First, there is a substantial governmental interest in the strict regulation of horse racing so as to preserve and promote its safety and integrity. The legislature has substantial power to regulate non-essential, dangerous, and sensitive industries to protect the public safety and welfare. *Delguidice*, *supra* (horse racing). *See also Martin*, *supra* (casino gambling); *Niglio*, *supra* (horse racing). The state has a legitimate interest in preventing the use of alcohol and dangerous controlled substances by jockeys in such a manner as would affect their performance in, and the outcome of races. The certification

form requires jockeys to disclose the names of prescribed medications, the names of persons who prescribed them, and the date and time of the last dosage of each medication taken. The form also requires jockeys to disclose the names of over-the-counter medications used, and the date and time of the last dosage taken. The part of the form pertaining to disclosure of the illness being treated by the medications is optional.[9]

The disclosure of the medical information as required by the form narrowly furthers the state's legitimate interests. Only those jockeys submitting urine samples must complete the forms. They are used as a check against the results of any test which might otherwise be considered as "positive" for drug use. Further, the state treats these forms as confidential, in the same manner as the results of the urine tests. The court finds that the use of the certification forms, as modified by the court's Order of May 23, 1985, does not violate plaintiffs' right to privacy.

Second, the court finds that the urine test regulations as administered by the Commission, provide sufficient safeguards against disclosure, for safe keeping, and for their timely destruction. While the regulations expressly provide that only "results" of urine tests are subject to confidentiality, the Commission has promulgated regulations in response to this court's directive,[10] which would extend such protection to all

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9 The court previously ordered the Commission to insert the word "Optional" by those portions of the form which pertain to disclosure of the illness treated and are labeled "For Treatment Of." This is fully consistent with the state's representation that it did not require completion of these sections. *Shoemaker, supra*, 608 F. Supp. at 1160.

10 The Commission proposed the amended rules in response to the court's directive in its Opinion of May 23, 1985:

> The court believes that the Racing Commission can take affirmative, immediate measures to clarify any ambiguities which may exist. The Commission's regulations should contain provisions governing the storage of and access to the information collected, the length of time data will be kept, and the precautions utilized to safeguard the

information gathered pursuant to the rule. All such information will be stored in a safe at the offices of the Commission. Information gathered will be routinely destroyed after one year, with an exception for data from jockeys who have tested positive. Once a jockey has tested positive for drug use, the data can be retained to record the number of violations, the result of any treatment programs, and for use in considering future violations. Disclosure of information is limited to those individuals at the Racing Commission who have a specific and legitimate interest in the testing results—the Commissioners, the Executive Director or his designee, and the jockey. The proposed regulation would also include the Commission's counsel. The information is subject to disclosure only during a contested matter. The state has represented to the court that although these regulations have yet to be formally adopted by the Commission, it is proceeding to treat all information gathered under the rule as if governed by the proposed confidentiality procedures. The record is completely devoid of any evidence to suggest that the Commission, or any other person or body involved in the adjudication of disputes under the rule, will or did act in a manner inconsistent with plaintiffs' rights.

Likewise, plaintiffs' argument that the regulations require them to divulge potentially self incriminating material is without merit. The regulations provide for only civil administrative penalties. The State Division of Criminal Justice will not seek to obtain information gathered under the rule for criminal investigations or prosecutions. Use of controlled dangerous substances with a valid prescription from a licensed physician is not illegal. Mere use of such drugs without a prescription is not a crime—only a disorderly persons offense. The court finds, therefore, that the urine test rule, as administered, does not violate plaintiffs' privacy rights.

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information from disclosure. Should defendants fail to take measures to remedy existing ambiguities from the regulations, the court reserves its right to reconsider injunctive relief.

Shoemaker, supra, 608 F. Supp. at 1161, n.3.

Third, plaintiffs also claim that the breathalyzer tests violate their privacy rights because (1) any information obtained therefrom is not subject to any confidentiality regime, and (2) the tests are not administered to the jockeys privately. First, the state does not represent to the court that the data collected in the administration of the breathalyzer rule is subject to the same confidentiality procedures operative under the urine test rule. The court finds that the balance of interests asserted require the state to treat the information generated by the breathalyzer tests in the same manner as that gathered under the urine test rule. Second, the state argues that it would prefer to give the breathalyzer tests privately and is working towards meeting this goal, but that logistical problems have prevented private administration to date. Although the court recognizes that jockeys have diminished expectations of privacy while in the Jockey's Room at the race track, it concludes that, as a matter of law, the state must administer these tests privately, away from the view of persons who are not required for the administration of the tests.

E. *Conclusion*

For the reasons provided above, the court finds that the breathalyzer test is subject to the same confidentiality guidelines as is the urine test and must be given privately, away from the view of persons who are not required for its administration. Plaintiffs' prayer for relief is denied in all other respects. An appropriate order will be entered.

/s/ STANLEY S. BROTMAN
Stanley S. Brotman, *U.S.D.J.*

Dated: September 9, 1985

NEW JERSEY RACING COMMISSION

Thoroughbred Rules:
Breathalyzer Test; Urine Test

Adopted New Rules: N.J.A.C. 13:70-14A.10 and 14A.11 (proposed as 13:70-14A.13 and 14A.15)

Proposed: June 18, 1984 at 16 N.J.R. 1457(a).
Adopted: January 14, 1985 by New Jersey Racing Commission, Harold G. Handel, Executive Director.
Filed: January 28, 1985 as R.1985 d.57, without change.

Authority: N.J.S.A. 5:5-30.

Effective Date: February 19, 1985.
Operative Date: April 1, 1985.
Expiration Date pursuant to Executive Order No. 66(1978): February 19, 1990.

Summary of Public Comments and Agency Responses: No comments received.

Full text of the adoption follows.

13:70-14A.10 Breathalyzer test

Officials, jockeys, trainers and grooms shall, when directed by the State Steward, submit to a breathalyzer test and if the results thereof show a reading of more than .05 percent of alcohol in the blood, such persons shall not be permitted to continue his duties. The stewards may fine or suspend any participant who records a blood alcohol reading of .05 percent or more. Any participant who records a reading above the prescribed level on more than one occasion shall be subject to expulsion, or such penalty as the stewards may deem appropriate.

13:70-14A.11 Urine test

(a) No jockey shall use any Controlled Dangerous Substance as defined in the "New Jersey Controlled Dangerous Substance

Act", N.J.S.A. 24:21-1, et seq. or any prescription legend drug, unless such substance was obtained directly, or pursuant to a valid prescription or order from a licensed physician, while acting in the course of his professional practice. It shall be the responsibility of the jockey to give prior notice to the State Steward that he is using a Controlled Dangerous Substance or prescription legend drug pursuant to a valid prescription or order from a licensed practitioner.

(b) Every jockey for any race at any licensed racetrack may be subjected to a post-race urine test, or other non-invasive fluid test at the direction of the State Steward in a manner prescribed by the New Jersey Racing Commission. Any jockey who fails to submit to a urine test when requested to do so by the State Steward shall be liable to the penalties provided in N.J.A.C. 13:70-31.

(c) Any jockey who is requested to submit to a post-race urine test shall provide the urine sample, without undue delay, to a Chemical Inspector of the Commission. The sample so taken shall be immediately sealed and tagged on the form provided by the Commission and the evidence of such sealing shall be indicated by the signature of the tested jockey. The portion of the form which is provided to the laboratory for analysis shall not identify the individual jockey by name. It shall be the obligation of the jockey to cooperate fully with the Chemical Inspector in obtaining any sample which may be required and to witness the securing of such sample.

(d) A "positive" Controlled Dangerous Substance or prescription drug result shall be reported, in writing, to the Executive Director or his designee. On receiving written notice from the official chemist that a specimen has been found "positive" for controlled dangerous substance, or prescription legend drug, the Executive Director or his designee shall proceeds follows:

1. He shall, as quickly as possible, notify the jockey involved, in writing;

2. For a jockey's first violation, he shall issue a written reprimand and warning and notify the jockey that he will be subject to mandatory drug testing and that any further violation shall result in the sanctions described in paragraphs (3) and (4) below;

3. For a jockey's second violation, he shall require the jockey to enroll in a Supervisory Treatment Program approved by the New Jersey Racing Commission upon such reasonable terms and conditions as he may require. The jockey shall be permitted to participate unless his continued participation shall be deemed, by the Executive Director or his designee, to be detrimental to the best interests of racing. It shall be the jockey's responsibility to provide the Commission with written notice of his enrollment, weekly status reports, and written notice that he has successfully completed the program and has been discharged. If a jockey fails to comply with these requirements, he shall be liable to the penalties provided in N.J.A.C. 13:70-31.

4. For a jockey's third or subsequent violation, he shall be liable to the penalties provided in Subchapter 31 and may only enroll into a Supervisory Treatment Program in lieu of said penalties, with the approval of the New Jersey Racing Commission.

(e) The results of any urine test shall be treated as confidential, except for their use with respect to a ruling issued pursuant to this rule, or any administrative or judicial hearing with regard to such a ruling. Access to the reports of any "positive" results shall be limited to the Commissioners of the New Jersey Racing Commission, the Executive Director and/or his designee and the subject jockey, except in the instance of a contested matter.

DATE _____ TRACK _____

JOCKEY'S NAME _____

I AM ☐
AM NOT ☐

Taking prescription medication or over the counter medication. If you are taking either or both of the above complete the following

Name of Prescribed medication(s) _____
_____
_____

Prescribed By: _____
For Treatment Of: _____
Last Dose: Time: _____ Date: _____

Name of Over-the-Counter Medication:
_____
_____
_____

For Treatment Of: _____
Last Dose: Time: _____ Date: _____

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Signature: _____

PROPOSED AMENDMENTS TO URINE TEST RULE

13:70-14A.11 Urine Test

(a) No [jockey] *licensee or official* shall use any Controlled Dangerous Substance as defined in the "New Jersey Controlled Dangerous Substance Act", N.J.S.A. 24:21-1, et seq. or any prescription legend drug, unless such substance was obtained directly, or pursuant to a valid prescription or order from a licensed physician, while acting in the course of his professional practice. It shall be the responsibility of the [jockey] *Official, Jockey, Trainer and Groom* to give [prior] notice to the State Steward that he is using a Controlled Dangerous Substance or prescription legend drug pursuant to a valid prescription or order from a licensed practitioner *when requested.*

(b) Every [jockey] *Official, Jockey, Trainer and Groom* for any race at any licensed racetrack may be subjected to a [post-race] urine test, or other non-invasive fluid test at the direction of the State Steward in a manner prescribed by the New Jersey Racing Commission. Any [jockey] *Official, Jockey, Trainer or Groom* who fails to submit to a urine test when requested to do so by the State Steward shall be liable to the penalties provided in N.J.A.C. 13:70-31.

(c) Any [jockey] *Official, Jockey, Trainer or Groom* who is requested to submit to a [post-race] urine test shall provide the urine sample, without undue delay, to a chemical inspector of the Commission. The sample so taken shall be immediately sealed and tagged on the form provided by the Commission and the evidence of such sealing shall be indicated by the signature of the tested [jockey] *Official, Jockey, Trainer or Groom*. The portion of the form which is provided to the laboratory for analysis shall not identify the individual [jockey] *Official, Jockey, Trainer or Groom* by name. It shall be the obligation of the [jockey] *Official, Jockey, Trainer or Groom* to cooperate fully with the Chemical Inspector in

obtaining any sample which may be required and to witness the securing of such sample.

(d) A "positive" Controlled Dangerous Substance or prescription drug result shall be reported, in writing, to the Executive Director or his designee. On receiving written notice from the official chemist that a specimen has been found "positive" for controlled dangerous substance or prescription legend drug, the Executive Director or his designee shall proceed as follows:

1. He shall, as quickly as possible, notify the [jockey] *Official, Jockey, Trainer or Groom* involved in writing.

2. For an [jockey's] *Official, Jockey, Trainer or Groom's* first violation, he shall issue a written reprimand and warning and notify the [jockey] *Official, Jockey, Trainer or Groom* that he will be subject to mandatory drug testing and that any further violation shall result in the sanctions described in paragraphs (3) and (4) below:

3. For an [jockey's] *Official, Jockey, Trainer or Groom's* second violation, he shall require the [jockey] *Official, Jockey, Trainer or Groom* to enroll in a Supervisory Treatment Program approved by the New Jersey Racing Commission upon such reasonable terms and conditions as he may require. The [jockey] *Official, Jockey, Trainer or Groom* shall be permitted to participate unless his continued participation shall be deemed, by the Executive Director or his designee, to be detrimental to the best interests of racing. It shall be the [jockey's] *Official, Jockey, Trainer or Groom's* responsibility to provide the Commission with written notice of his enrollment, weekly status reports and written notice that he has successfully completed the program and has been discharged. If an [jockey] *Official, Jockey, Trainer or Groom* fails to comply with these requirements, he shall be liable to the penalties provided in N.J.A.C. 13:70-31.

4. For an [jockey's] *Official, Jockey, Trainer or Groom's* third or subsequent violation, he shall be liable

to the penalties provided in Subchapter 31 and may only enroll into a Supervisory Treatment Program in lieu of said penalties, with the approval of the New Jersey Racing Commission.

(e) The results of any urine test shall be treated as confidential, except for their use with respect to a ruling issued pursuant to this rule, or any administrative or judicial hearing with regard to such a ruling. Access to the reports of any "positive" results shall be limited to the Commissioners of the New Jersey Racing Commission, the Executive Director and/or his designee and the subject [jockey] *Official, Jockey, Trainer or Groom* except in the instance of a contested matter.

AMENDMENTS TO THE URINE TEST RULE

e) Any information collected in the process of obtaining a urine sample, including but not limited to medical information, the results of any urine test, and any reports filed as a result of attending a Supervisory Treatment Program shall be treated as confidential, except for their use with respect to a ruling issued pursuant to this rule, or any administrative or judicial hearing with regard to such a ruling. Access to the collected information and/or reports of any positive results and/or reports from a Supervisory Treatment Program shall be limited to the Commissioners of the New Jersey Racing Commission, the Executive Director and/or his designee, Counsel to the Racing Commission, and the subject, except in the instance of a contested matter. In the instance of a contested matter, any collected information and reports shall not be disclosed without the approval of the Executive Director or his designee.

f) Information collected and reports prepared pursuant to this rule shall be stored in a locked secure area in the office of the Executive Director for a period of one year, after which time, they shall be destroyed. However, the Commission may maintain the collected information and reports on individuals who have violated this rule for the purpose of recording the number of violations and the results of supervisory treatment and for use should future violations occur.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 85-1770

WILLIAM SHOEMAKER, ANGEL CORDERO, JR., WILLIAM HERBERT MCCAULEY, PHILIP GROVE and VINCENT BRACCIOLE,

Plaintiffs,

—v.—

HAL HANDEL, Executive Director of the New Jersey Racing Commission, SAMUEL A. BOULMETIS, Steward Representing NJ Racing Commission, JOSEPH F. PIARULLI, Associate Steward, CARL H. HANFORD, Associate Steward and RICHARD W. LAWRENSON, Associate Steward,

Defendants.

ORDER

This matter having come before the court on June 18, 19, 21 and July 1, 1985; and

The court having considered the submissions and arguments of the parties and the testimony taken; and

For the reasons stated in the court's Findings of Fact and Conclusions of Law filed this date,

It is on this 9th day of September, 1985, hereby ORDERED that N.J.A.C. 13:70-14A.10 ("Breathalyzer test") is subject to the same confidentiality guidelines which govern the administration of N.J.A.C. 13:70-14A.11 ("Urine test").

It is FURTHER ORDERED that N.J.A.C. 13:70-14A.10 ("Breathalyzer test") must be given privately, away from the view of other persons who are not required for the administration of the test; and

It is FURTHER ORDERED that plaintiffs' prayer for relief is DENIED in all other respects.

No costs.

/s/ STANLEY S. BROTMAN

Stanley S. Brotman, *U.S.D.J.*

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Defendants.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

APPEARANCES:

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BROTMAN, *District Judge*

Plaintiffs, William Shoemaker, Angel Cordero, Jr., William Herbert McCauley, Philip Grove, and Vincent Bracciole bring this action under 42 U.S.C. § 1983, seeking a preliminary injunction against defendants Hal Handel, Samuel A. Boulmetis, Joseph A. Piarulli, Carl H. Hanford, and Richard W. Lawrenson, to restrain the enforcement of New Jersey Racing Commission Regulations N.J.A.C. 13:70-14A.10 and 13:70-14A.11, which provide for breathalyzer and urine tests for licensed jockeys.

This matter having come before the court on April 24, 1985, and the court, having considered the submissions and arguments of the parties, makes the following findings of fact and conclusions of law.

I. *FINDINGS OF FACT*

1. Plaintiffs William Shoemaker, Angel Cordero, Jr., William Herbert McCauley, Philip Grove, and Vincent Bracciole are licensed jockeys of the State of New Jersey who have ridden and intend to continue to ride in thoroughbred horse races in the State of New Jersey.

2. Defendant Hal Handel is the Executive Director of the New Jersey Racing Commission ("Racing Commission"), Trenton, New Jersey.

3. Defendant Samuel A. Boulmetis is the Steward representing the Racing Commission at the race meeting held at the Garden State Park, Cherry Hill, New Jersey.

4. Defendants Joseph A. Piarulli, Carl H. Hanford, and Richard W. Lawrenson are Associate Stewards representing the Racing Commission at the race meeting held at the Garden State Park, Cherry Hill, New Jersey.

5. The New Jersey State Legislature has established a New Jersey Racing Commission, vested with the broad "powers necessary or proper to enable it to carry out fully and effectually all the provisions and purposes of this act," including

jurisdiction over "any and all persons, partnerships, associations or corporations which shall hereafter hold or conduct any meeting within the State of New Jersey whereat horse racing shall be permitted for any stake, purse, or reward." N.J.S.A. 5:5-22.

6. The Racing Commission promulgated N.J.A.C. 13:70-14A.10 and 14A.11 (attached hereto as Appendix A), pursuant to its authority granted by N.J.S.A. 5:5-30. These regulations permit the use of breathalyzer and urine tests to detect the presence of alcohol or controlled dangerous substances as defined in N.J.S.A. 24:21-1 *et seq.* They were proposed on June 18, 1984, 16 N.J.R. 1457(a), adopted on January 14, 1985, 17 N.J.R. 470, effective on February 19, 1985, and operational on April 1, 1985.

7. N.J.A.C. 13:70-14A.10 provides that a State Steward may direct officials, jockeys, trainers and grooms to submit to a breathalyzer test. If the result of that test shows a reading of .05 percent of alcohol in the blood, "such person shall not be permitted to continue his duties." The Steward "may fine or suspend any participant who records a blood alcohol reading of .05 percent or more." Second or repeat offenders "shall be subject to expulsion, or such penalty as the stewards may deem appropriate."

8. N.J.A.C. 13:70-14A.11 provides, *inter alia*, that "[e]very jockey for any race at any licensed racetrack may be subjected to a post-race urine test, or other non-invasive fluid test at the direction of the State Steward in a manner prescribed by the New Jersey Racing commission. Any jockey who fails to submit to a urine test when requested to do so by the State Steward shall be liable to the penalties provided in N.J.A.C. 13:70-31." N.J.A.C. 13:70-14A.11(b). The regulation further provides that a "positive" drug test result be reported in writing to the Executive Director of the Racing Commission or his designee. N.J.A.C. 13:70-14A.11(d).

9. N.J.A.C. 13:70-14A.11 also provides that "[t]he results of any urine test shall be treated as confidential, except for

their use with respect to a ruling issued pursuant to this rule, or any administrative or judicial hearing with regard to such a ruling. Access to the reports of any "positive" results shall be limited to the Commissioners of the New Jersey Racing Commission, the Executive Director and/or his designee and the subject jockey, except in the instance of a contested matter." N.J.A.C. 13:70-14A.11(e).

10. N.J.A.C. 13:70-14A.11 also provides that "[n]o jockey shall use any Controlled Dangerous Substance as defined in the "New Jersey Controlled Dangerous Substance Act," N.J.S.A. 24:21-1, *et seq.* or any prescription legend drug, unless such substance was obtained directly, or pursuant to a valid prescripion or order from a licensed physician, while acting in the course of his professional practice. It shall be the responsibility of the jockey to give prior notice to the State Steward that he is using a Controlled Dangerous Substance or prescription legend drug pursuant to a valid prescription or order from a licensed practitioner." N.J.A.C. 13:70-14A.11(a).

11. On April 1, 1985, a meeting was held in the jockey's room at the Garden State Park, Cherry Hill, New Jersey, among representatives of the Racing Commission, jockeys, and representatives of the National Jockeys Guild, the purpose of which was to explain the new regulations.

12. The Jockeys Guild requested that the Racing Commission defer implementation of these regulations until a court challenge to their validity could be mustered. The Racing Commission declined to defer enforcement.

13. Defendants have forced or threatened to force plaintiffs to undergo breathalyzer and/or urine testing pursuant to N.J.A.C. 13:70-14A.10 and 14A.11.

14. Defendants have forced or threatened to force plaintiffs to fill out certain forms requiring the disclosure of personal medical data and other information pursuant to N.J.A.C. 13:70-14A.11(a).

II. *CONCLUSIONS OF LAW*

1. The following Conclusions of Law, insofar as they may be considered Findings of Fact, are so found by this court to be true in all respects.

2. Jurisdiction is conferred upon this court by 28 U.S.C. §§ 1331 and 1343, this being a suit under 42 U.S.C. § 1983, which provides, in pertinent part, that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State. . .subjects, or causes to be subjected, any citizen of the United States. . .to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. In order to support the entry of a preliminary injunction under Federal Rule of Civil Procedure 65(b), the applicant must make a showing as to the following four factors:

(a) the significance of the threat of irreparable harm to plaintiffs if the injunction is not granted;

(b) the state of the balance between this harm and the injury that granting the injunction would inflict upon the defendant;

(c) the probability that plaintiff will prevail on the merits; and

(d) the public interest will be served.

The court must balance these factors. *In re Arthur Treacher's Franchise Litigation*, 689 F.2d 1137, 1143 (3rd Cir. 1982); *Continental Group, Inc. v. Amoco Insurance Company*, 614 F.2d 351 (3rd Cir. 1980); *Rennie v. Klein*, 462 F. Supp. 1131, 1142 (D.N.J. 1978).

4. A petition for a preliminary injunction is addressed to the sound discretion of the trial court, *Evening News Publishing Company v. Allied Newspaper Carriers of New Jersey*, 419 F.

Supp. 460, 462 (D.N.J. 1975), and such relief should be granted only when it is necessary to preserve the status quo during the pendency of an action so as to avoid irreparable harm.

5. Plaintiffs allege that N.J.A.C. 13:70-14A.10 and 14A.11 violate their rights guaranteed by the Fourth, Fifth, and Ninth Amendments and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution. Specifically, plaintiffs argue that defendants:

(a) subject jockeys to unreasonable searches and seizures;

(b) require the disclosure of private medical information, potentially relevant to violations of the criminal law of the State of New Jersey, without adequate safeguards for maintaining its confidentiality.

(c) fail to provide a hearing during which plaintiffs can challenge the results of the breathalyzer and urine tests; and

(d) discriminate against jockeys as a group by singling them out for breathalyzer and urine testing.

The court will address the strength of the plaintiffs' claims *seriatim*.

6. *The Search and Seizure Claim.* The Fourth Amendment provides that "[t]he right of the people to be secure in their persons. . .against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The essential purpose of the proscriptions in the Fourth Amendment is to "impose a standard of 'reasonableness' upon the exercise of discretion by government officials," including law enforcement agents and state regulatory personnel, in order to "safeguard the privacy and security of individuals against arbitrary intrusions. . . ." *Delaware v. Prouse*, 440 U.S. 648 (1979); *Marshall v. Barlow's Inc.*, 436 U.S. 307, 312 (1978); *Camara v. Municipal Court*, 387 U.S. 521, 528

(1967). Thus, the Fourth Amendment protects individuals from "unreasonable government intrusions into their legitimate expectations of privacy." *United States v. Chadwick*, 433 U.S. 1, 7 (1977).

Except in certain carefully limited classes of cases, a search of private property or person without consent is "unreasonable" unless it has been authorized by a valid search warrant. *See Marshall, supra*. An exception to the search warrant requirement has been recognized for "pervasively regulated businesses" and for "closely related" industries "long subject to close supervision and regulation." *Id.*; *United States v. Biswell*, 406 U.S. 311, 316 (1972); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1977). These cases are indeed exceptions,

> but they represent responses to relatively unique circumstances. Certain industries have such a history of government oversight that no reasonable expectation of privacy * * * could exist for a proprietor over the stock of such an enterprise. Liquor (*Colonnade*) and firearms (*Biswell*) are industries of this type; when an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation.
>
> Industries such as these fall within "certain carefully defined classes of cases," referenced in *Camera*, 387 U.S., at 528, 87 S. Ct., at 1731. The element that distinguishes these enterprises from ordinary businesses is a long tradition of close government supervision, of which any person who chooses to enter such a business must already be aware. . .businessmen engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade. . .The businessman in a regulated industry in effect consents to the restrictions placed upon him.

Marshall, supra at 313.

Horse racing meets *both* exceptions to the search warrant requirement articulated above. This industry has been subject

to "pervasive *and* long standing regulation by New Jersey." *State v. Dolce*, 178 N.J. Super. 275, 283-85 (App. Div. 1981) (emphasis added).

> The State has had and continues to have a vital interest in the horse racing industry, particularly with respect to maintaining its integrity. *Jersey Downs, Inc. v. New Jersey Racing Commission*, 102 N.J. Super. 451, 457 (App. Div. 1968). Consequently, our legislature has established the Racing Commission and vested in it the power and duty to govern all aspects of horse racing in this State, including all those working in the industry. N.J.S.A. 5:5-22. To this end, the Racing Commission was granted broad rule-making powers to protect the state's interest in the industry and to carry out its statutory mandate. N.J.S.A. 5:5-30.

Dolce, *supra* at 284-85; *see also Biswell*, *supra* at 316 (firearms); *Colonnade*, *supra* at 77 (liquor); *In re Martin*, 90 N.J. 295, 313 (1982) (casino gambling); *State v. Williams*, 84 N.J. 217, 223-25 (1980) (liquor); *Jersey Downs, Inc.*, *supra* at 457 (horse racing); *Niglio v. New Jersey Racing Commission*, 158 N.J. Super. 182, 188 (App. Div. 1978) (horse racing).

While horse racing comes within the recognized exception to the administrative search warrant rule, the courts must still address whether the state's regulations which provide for the use and administration of breathalyzer tests and urinalyses meet the "reasonableness" test of the Fourth Amendment. As the Supreme Court has noted,

> [Reasonableness] is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Bell v. Wolfish, 441 U.S. 520, 529 (1979); *Illinois v. Lafayette*, 462 U.S. 640 (1983). *See also Schmerber v. California*, 384

U.S. 757 (1966) (Court must balance the interest in human dignity and privacy against the reasonableness of the test and the reasonableness of the manner in which the test is conducted); *Rochin v. California*, 342 U.S. 165 (1952) (Due process of law precludes defining, and therefore confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice"). The courts have used this standard to differentiate between levels and degrees of intrusiveness among searches and seizures. As measured by the degree of invasion, inspections of personal effects are generally least intrusive, while breaches of the "integrity of the body" result in the greatest invasion of privacy. The court, of course, must also consider an individual's reasonable expectations of privacy under the circumstances. In other words, the court must balance the competing interests involved on a case-by-case basis.

Plaintiffs rely heavily on a recent Second Circuit case in arguing that the New Jersey Racing Commission's drug and alcohol testing program is unconstitutional. *See Security and Law Enforcement Employees, District Council 82 v. Carey*, 737 F.2d 187 (2nd Cir. 1984). In *Security and Law Enforcement Employees*, the state adopted a system of random "strip searches" and "visual body cavity searches" of state correctional officers in an effort to reduce the smuggling of contraband into state penal institutions.[1] The court recognized the uniqueness of the correctional institutions involved, the deference traditionally afforded prison administrators by the courts, the legitimate government interest in the maintenance of stability, security, and order in its correctional facilities, and a corrections officer's diminished expectations of privacy while at work in the penal institution. Nevertheless, the court also recognized the uniquely intrusive nature of a strip search and visual body cavity search, and, despite the significant govern-

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1 The court defined "strip searches" as "inspections of the naked body of the person searched," and "visual body cavity searches" as "visual inspections of the anal and genital areas."

ment interests involved, held that such searches required the presence of "reasonable suspicion" of wrongdoing prior to their utilization. *Id.* at 203.

Likewise, the Ninth Circuit, in a series of cases within the special context of border searches under the Fourth Amendment, differentiated between strip and body cavity searches and less intrusive searches. Government agents could require one who crosses the border, without more, to submit the contents of his baggage for inspection. A simple pat down search requires a "minimal showing of suspicion." A strip search requires "real suspicion," and a body cavity search and/or x-ray examination can be conducted only in the presence of a "clear indication that the suspect is carrying contraband in a body cavity." *United States v. Des Jardins*, 747 F.2d 499, 504-05 (9th Cir. 1984). *See also United States v. Asbury*, 586 F.2d 973, 975 (2nd Cir. 1978) (To conduct a strip search at a border crossing, the government agent "should have a suspicion of illegal concealment that is based on something more than the border crossing. . . .").

The court finds that plaintiffs fail to demonstrate that the Racing Commission's breathalyzer testing and urinalysis program is not closely tailored to further the state's legitimate interest in reducing the use of alcoholic beverages and drugs, thereby promoting the safety and integrity of horse racing and protecting the public.

First, the regulations contested by plaintiffs were promulgated for the specific purpose of combatting and hopefully eliminating the perceived and actual use of alcohol and drugs which plagues this sport, as well as so many others. Use of drugs and alcohol by jockeys increases significantly the probability that serious injuries and death will occur during the race, as a result of single and multi-horse accidents. The state argues that the testing regimen previously used proved ineffective and failed to stop or reduce the use of these substances. As a result, the state has issued new regulations which may increase the likelihood of success and which provide for such testing at the direction of the State Steward when it appears most efficacious—at the track, proximate to race time. In this respect, the

court notes that "substantially identical regulations are in effect for the testing of harness drivers" in New Jersey. The harness breathalyzer rule has been in effect for several years. Harness drivers have been required to submit to random post-race urine tests since January 1985. Affidavit of John F. Higgins, Administrative Secretary of the Standard-bred Breeders and Owners Association of New Jersey, Inc., May 1, 1985, at ¶ 3. From June, 1982 to the present, 385 tests have been conducted on harness drivers on a random basis, using the Enzyme Multiplied Immunoassay Technique System of analysis. Thirty-five of these tests, more than eight percent, proved positive. Readings ranged from marijuana to heroin use. Affidavit of Charles F. Bradley, Assistant Director of the New Jersey Racing Commission, May 6, 1985, at ¶¶ 3, 4.

Second, these tests as applied to jockeys are not unique. Boxing is also a heavily regulated industry in New Jersey, with boxers being subject to stringent regulations and testing as to their physical fitness to compete. All boxers must undergo physical examinations on the day of the bout "both at weigh in and in the evening, a short while before the boxing program commences." These tests include blood samples, and "[i]n all cases. . .a thorough ophthalmological and neurological examination and a urinalysis." N.J.A.C. 13:46-12.2(a). A boxer may be disqualified for any medical reason. N.J.A.C. 13:46-12.2(b). The boxer "must submit to any prefight or postfight urinalysis or other laboratory procedure ordered by the physician appointed by the Commissioner to detect the presence of any drug. Refusal to submit to such testing shall result in the immediate disqualification of the boxer from the match and an indefinite suspension from boxing. N.J.A.C. 13:46-12.3.

Third, while the Supreme Court has refrained from drawing bright lines among searches, breathalyzer tests and urinalyses are considered less intrusive than body cavity and strip searches and those searches which have been identified as intruding upon the "integrity of the body," *see Schmerber*, *supra*; *United States v. Ramsey*, 431 U.S. 606, 618 n.1 (1976); *Des Jardins*, *supra*; and therefore, (1) are distinguishable from *Security and Law Enforcement Employees*, *supra*, on the facts

and (2) fully consistent with the logic of *Des Jardins*' heirarchy of suspicion. While breathalyzer and urine tests require the individual involved to "give up" something, the intrusion is less than the involuntary securing of a blood sample or other searches into which an intrusion into the body is required.[2]

Fourth, jockeys have diminished expectations of privacy as to these job related searches and seizures. The jockeys admit to the pervasive historical regulation of their industry:

> Jockeys, like other athletes have always been subject to medical examinations or testing where they exhibited some physical symptomatology indicating a potential problem with their riding performance.

Plaintiffs' Brief at 16-17. The state's regulations go one step further by permitting the random examination of jockeys at the direction of the Steward. Jockeys are licensed by the State to race in New Jersey, subject to the extensive and detailed conditions and regulations in effect. By securing their licensure, jockeys accept the unique benefits as well as the burdens of their trade. They have notice that the state has regulations which concern aspects of their physical and mental fitness to ride. This includes alcohol and drug use which impedes their riding performance. The state has a legitimate interest in ensuring the health and safety of all participants and in preserving the integrity of the gambling industry as a whole. *See Dolce*, *supra* (horse racing); *Jersey Downs*, *supra* (horse racing); *Niglio*, *supra* (horse racing); *Martin*, *supra* (casino gambling). *See also Biswell*, *supra* (If firearms inspection is to serve as an effective deterrent, "unannounced, even frequent

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2 Despite the intrusion, the Supreme Court has upheld the involuntary taking of a blood sample under certain circumstances. *See, e.g.*, *Schmerber*, *supra* (physician acting under police direction can take a blood sample from an objecting defendant where delay in obtaining a search warrant threatened to destory the evidence); *Breithaupt v. Abram*, 352 U.S. 432 (1957) (blood sample taken from an unconscious person permitted because the "interests of society in the scientific determination of intoxication, one of the great causes of the mortal hazards of the road" outweighed "so slight an intrusion into the body.")

inspections are essential"); *Colonnade*, *supra* (Congress has broad authority over the liquor industry to fashion standards of reasonableness over searches and seizures). *Cf. Prouse*, *supra* (Automobile operators do not lose all expectations of privacy because automobile use is subject to government regulation. "Auto travel is a basic, pervasive and often necessary mode of transportation to and from one's home, workplace, and leisure activities. . ."). By adopting these regulations the state has embarked upon a unique regulatory program, rehabilitative rather than penal in nature.

The court is reluctant, without a greater showing by plaintiffs, to enjoin part of an extensive state regulatory scheme, especially when such action may be perceived by the public as undermining the ability of the Racing Commission to adequately police this industry or the public's confidence in the Racing Commission's ability to do its job. The court finds that, at this point, plaintiffs have failed to meet their burden to demonstrate a probability of success on the merits, that plaintiffs will suffer any irreparable harm as a result of continued testing during the duration of this litigation, and that the public interest in the integrity and safety of thoroughbred racing will be served by an injunction. Therefore, the court denies plaintiffs' motion for a preliminary injunction preventing the enforcement of N.J.A.C. 13:70-14A.10 and 13:70-14A.11.

7. *The Privacy Claim.* The state forbids plaintiffs from using any Controlled Dangerous Substances, as defined by N.J.S.A. 24:21-1 *et seq.*, or prescription legend drugs, unless obtained directly or pursuant to a valid prescription or order from a licensed physician. Plaintiffs must give the State Steward notice of such use. N.J.A.C. 13:70-14A.11(a). Plaintiffs must fill out a form (*see* Appendix B attached hereto), which asks for the names of prescribed medications, the names of the persons who prescribed them, what each prescription treats, and the date and time of the last dosage of each medication taken. The form also requires that plaintiffs provide the names of over-the-counter medications used, what these medications treat, and the date and time of the last dosage. Plaintiffs argue

that the regulation (1) forces jockeys to divulge private, personal medical information without sufficient justification, (2) forces jockeys to divulge information which could incriminate them under the laws of New Jersey, and (3) fails to provide adequate provisions and safeguards to prevent the disclosure of such information to the public and members of their profession.

While the constitution does not explicitly state that there is a right to privacy, a constitutional doctrine has been established and expanded "variously described as recognizing a right to privacy." *McKenna v. Fargo*, 451 F. Supp. 1355 (1978); *see Carey v. Population Services Int'l*, 431 U.S. 678, 684-86 (1977); *Whalen v. Roe*, 429 U.S. 589 (1977). There is a privacy interest in avoiding disclosure to government agents of personal medical information. *Whalen*, *supra* at 608-09. However, this privacy interest is not absolute and must be balanced against the legitimate interests of the state in securing such information. The regulations must be narrowly tailored to "express only those compelling state interests." *McKenna*, *supra* at 1351; *Dolce*, *supra*. The extent of the plaintiffs' privacy interests must be judged in light of the statutory safeguards against disclosure. *Whelan*, *supra*; *Lehrhaupt v. Flynn*, 140 N.J. Super. 250, 260-63 (App. Div. 1976), *aff'd*, 75 N.J. 459 (1978). The state must use the narrowest means consistent with the maintenance of its legitimate interests. *Martin*, *supra*; *Lehrhaupt*, *supra* at 262, 264; *Kenny v. Byrne*, 144 N.J. Super. 243, 253 (App. Div. 1976), *aff'd*, 75 N.J. 458 (1978).

In *Whalen*, the Supreme Court held that disclosure of an individual's name, age, address, and use of a certain drug did not (1) unduly burden his privacy interest nor (2) differ significantly from the disclosures of private medical information requested by insurance companies and hospital personnel. *Whalen*, *supra* at 608. In *Martin*, the New Jersey Superior Court upheld the use of a casino license form pursuant to the Casino Control Act, holding that none of the challenged questions were "so personal" as to permit the assertion of a right of selective disclosure. The questions on the casino license

form concerned "predominantly information of public record." *Martin*, *supra* at 321-22. In *McKenna*, the United States District Court for the District of New Jersey found that the degree and character of the required medical disclosure was "far greater and more intrusive" than in *Whalen*. *McKenna*, *supra* at 1381. The Jersey City Fire Department required a thorough psychological examination as a prerequisite to employment. The court found that:

> The evaluation looks deeply into an applicant's personality, much as a clinical psychologist would if requested to do so by an applicant. Fire-fighter candidates are called upon to reveal the essence of their experiences of life, the collective stream of thoughts and feelings that arise from the ongoing dialogue which individuals carry on between the world and themselves in the privacy of their being.

Id. However, the court found the state's interest in the medical disclosure sufficiently compelling to override the applicant's privacy interests:

> The life of a community, as well, depends, at the most basic level, on those whose job it is to protect the community from physical forces, like fire, that have escaped from the control that makes them productive. Property, and the security of the community, as well as lives, are at stake in improving the fire department. The state interest is compelling, indeed. . .and is served by the challenged evaluation and hiring procedure.

Id. at 1381.

The state's disclosure form, by asking jockeys to provide the nature of the illness requiring treatment by prescription drug, is more intrusive than the disclosures discussed in *Whalen* and *Martin*, *supra*. For example, if a jockey takes anti-psychotic medications, he would be required to divulge, if applicable, that he suffers from certain mental illnesses or diseases. The court recognizes that the Racing Commission has a legitimate safety interest in preventing the use of Dangerous Controlled Substances by jockeys. The disclosure of certain medical information, and the forms utilized for that disclosure, furthers that

stated purpose. The court does not find persuasive the state's arguments that it has tailored the disclosure form so as to avoid unnecessarily intruding into private medical matters which are not germaine to the furtherance of the state's articulated interests. These medical forms require jockeys to disclose within the sections marked "For Treatment Of" the illness or conditions for which a particular drug has been prescribed or used. The regulation is designed to prevent the illicit use of drugs and to aid in the proper detection of that use. The court questions whether such disclosure will further the state's professed goals. In fact, such disclosure is not required on the face of the regulations issued by the Racing Commission. The state argues that the jockeys may, at their option, choose to leave the "For Treatment Of" sections blank when they complete these forms. Consistent with the state's representations as to this aspect of the controversy, the court directs the Racing Commission to insert the word "optional" in the "For Treatment Of" sections of the disclosure form, thereby clearly indicating to jockeys that they may leave the objectionable sections empty.

Plaintiffs also argue that the regulations do not clearly safeguard against the disclosure of information obtained by the testing program or the medical forms. The regulations do provide that the results of urine tests shall be treated as confidential "*except* for their use with respect to a ruling issued pursuant to this rule." Access to the results of "positive" urine tests "shall be limited to the Commissioners of the New Jersey Racing Commission, the Executive Director and/or his designee and the subject jockey, *except* in the instance of a contested matter." N.J.A.C. 13:70-14A.11(a) & (e) (emphasis added). The defendants have represented to this court that they wish to do everything possible to preserve the confidentiality of the medical information collected pursuant to the regulations. The Racing Commission will not share any data collected with any state agency charged with the enforcement of New Jersey's criminal laws. Such information is gathered with "rehabilitative" and not "penal" purposes in mind.

Under the circumstances, plaintiffs have failed to persuade the court that they are likely to prevail on the merits of their

privacy claims. Therefore, the court will deny plaintiffs' motion for a preliminary injunction and will vacate the Temporary Restraining Order entered on April 24, 1985.[3]

8. *The Due Process Claim.* Plaintiffs also allege that the regulations fail to provide a hearing at which plaintiffs can challenge the results of the breathalyzer and urine tests. The Racing Commission does provide a hearing, however, for jockeys wishing to challenge the results of the tests—at the jockeys' request. Affidavit of Bruce H. Garland, ¶ 9.

9. *The Equal Protection Claim.* Plaintiffs also allege that the regulations discriminate against jockeys by singling them out as a group for breathalyzer and urine testing, without a rational basis or compelling interest to do so. The state has a legitimate safety interest in testing the jockeys in order to reduce the possibility of accidents and even death while racing.

10. *Conclusion.* In summary, the court denies plaintiffs' motion for a preliminary injunction in its entirety. The court orders defendants to insert the word "optional" in the "For Treatment Of" sections of the medical disclosure form. The court will hear this matter on an expedited basis according to the following schedule: parties will attend a Scheduling Conference with United States Magistrate Jerome B. Simandle on May 20, 1985, at 3:00 p.m., the Joint Final Pre-Trial Order will be entered on June 7, 1985; the court will schedule a full hearing for June 18, 1985 at 9:30 a.m. An appropriate order will be entered.

/s/ STANLEY S. BROTMAN
Stanley S. Brotman, *U.S.D.J.*

Dated: May 13, 1985

3 The court believes that the Racing Commission can take affirmative, immediate measures to clarify any ambiguities which may exist. The Commission's regulations should contain provisions governing the storage of and access to the information collected, the length of time data will be kept, and the precautions utilized to safeguard the information from disclosure. Should defendants fail to take measures to remedy existing ambiguities from the regulations, the court reserves its right to reconsider injunctive relief.

NEW JERSEY RACING COMMISSION

Thoroughbred Rules:
Breathalyzer Test; Urine Test

Adopted New Rules: N.J.A.C. 13:70-14A.10 and 14A.11 (proposed as 13:70-14A.13 and 14A.15)

Proposed: June 18, 1984 at 16 N.J.R. 1457(a).
Adopted: January 14, 1985 by New Jersey Racing Commission, Harold G. Handel, Executive Director.
Filed: January 28, 1985 as R.1985 d.57, without change.

Authority: N.J.S.A. 5:5-30.

Effective Date: February 19, 1985.
Operative Date: April 1, 1985.
Expiration Date pursuant to Executive Order No. 66(1978): February 19, 1990.

Summary of Public Comments and Agency Responses: No comments received.

Full text of the adoption follows.

13:70-14A.10 Breathalyzer test

Officials, jockeys, trainers and grooms shall, when directed by the State Steward, submit to a breathalyzer test and if the results thereof show a reading of more than .05 percent of alcohol in the blood, such persons shall not be permitted to continue his duties. The stewards may fine or suspend any participant who records a blood alcohol reading of .05 percent or more. Any participant who records a reading above the prescribed level on more than one occasion shall be subject to expulsion, or such penalty as the stewards may deem appropriate.

13:70-14A.11 Urine test

(a) No jockey shall use any Controlled Dangerous Substance as defined in the "New Jersey Controlled Dangerous Substance

Act", N.J.S.A. 24:21-1, et seq. or any prescription legend drug, unless such substance was obtained directly, or pursuant to a valid prescription or order from a licensed physician, while acting in the course of his professional practice. It shall be the responsibility of the jockey to give prior notice to the State Steward that he is using a Controlled Dangerous Substance or prescription legend drug pursuant to a valid prescription or order from a licensed practitioner.

(b) Every jockey for any race at any licensed racetrack may be subjected to a post-race urine test, or other non-invasive fluid test at the direction of the State Steward in a manner prescribed by the New Jersey Racing Commission. Any jockey who fails to submit to a urine test when requested to do so by the State Steward shall be liable to the penalties provided in N.J.A.C. 13:70-31.

(c) Any jockey who is requested to submit to a post-race urine test shall provide the urine sample, without undue delay, to a Chemical Inspector of the Commission. The sample so taken shall be immediately sealed and tagged on the form provided by the Commission and the evidence of such sealing shall be indicated by the signature of the tested jockey. The portion of the form which is provided to the laboratory for analysis shall not identify the individual jockey by name. It shall be the obligation of the jockey to cooperate fully with the Chemical Inspector in obtaining any sample which may be required and to witness the securing of such sample.

(d) A "positive" Controlled Dangerous Substance or prescription drug result shall be reported, in writing, to the Executive Director or his designee. On receiving written notice from the official chemist that a specimen has been found "positive" for controlled dangerous substance, or prescription legend drug, the Executive Director or his designee shall proceeds follows:

1. He shall, as quickly as possible, notify the jockey involved, in writing;

2. For a jockey's first violation, he shall issue a written reprimand and warning and notify the jockey that he will be subject to mandatory drug testing and that any further violation shall result in the sanctions described in paragraphs (3) and (4) below;

3. For a jockey's second violation, he shall require the jockey to enroll in a Supervisory Treatment Program approved by the New Jersey Racing Commission upon such reasonable terms and conditions as he may require. The jockey shall be permitted to participate unless his continued participation shall be deemed, by the Executive Director or his designee, to be detrimental to the best interests of racing. It shall be the jockey's responsibility to provide the Commission with written notice of his enrollment, weekly status reports, and written notice that he has successfully completed the program and has been discharged. If a jockey fails to comply with these requirements, he shall be liable to the penalties provided in N.J.A.C. 13:70-31.

4. For a jockey's third or subsequent violation, he shall be liable to the penalties provided in Subchapter 31 and may only enroll into a Supervisory Treatment Program in lieu of said penalties, with the approval of the New Jersey Racing Commission.

(e) The results of any urine test shall be treated as confidential, except for their use with respect to a ruling issued pursuant to this rule, or any administrative or judicial hearing with regard to such a ruling. Access to the reports of any "positive" results shall be limited to the Commissioners of the New Jersey Racing Commission, the Executive Director and/or his designee and the subject jockey, except in the instance of a contested matter.

DATE _____ TRACK _____

JOCKEY'S NAME _____

I AM ☐
AM NOT ☐

Taking prescription medication or over the counter medication. If you are taking either or both of the above complete the following

Name of Prescribed medication(s) _____
_____
_____

Prescribed By: _____
For Treatment Of: _____
Last Dose: Time: _____ Date: _____

Name of Over-the-Counter Medication:
_____
_____
_____

For Treatment Of: _____
Last Dose: Time: _____ Date: _____

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Signature: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 85-1770

WILLIAM SHOEMAKER, ANGEL CORDERO, JR., WILLIAM HERBERT MCCAULEY, PHILIP GROVE and VINCENT BRACCIOLE,

Plaintiffs,

—v.—

HAL HANDEL, Executive Director of the New Jersey Racing Commission, SAMUEL A. BOULMETIS, Steward Representing NJ Racing Commission, JOSEPH F. PIARULLI, Associate Steward, CARL H. HANFORD, Associate Steward and RICHARD W. LAWRENSON, Associate Steward,

Defendants.

ORDER

This matter having come before the court on the 24th day of April, 1985; and

The court having considered the submissions and arguments of the parties; and

For the reasons stated in the court's opinion filed this date,

It is on this 13th day of May, 1985, hereby ORDERED that plaintiffs' petition for a preliminary injunction enjoining the enforcement of N.J.A.C. 13:70-14A.10 and 13:70-14A.11 is DENIED.

It is FURTHER ORDERED that defendants insert the word "optional" in the "For Treatment Of" sections of the medical disclosure form.

It is FURTHER ORDERED that the court will hear the above captioned matter on an expedited basis according to the following schedule:

A. Parties will attend a scheduling conference with United States Magistrate Jerome B. Simandle on May 20, 1985, at 3:00 p.m.

B. The Final Joint Pre-Trial Order will be entered on June 7, 1985.

C. A full hearing is scheduled for June 18, 1985, at 9:30 a.m.

No costs.

/s/ STANLEY S. BROTMAN
Stanley S. Brotman, *U.S.D.J.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5655

WILLIAM SHOEMAKER, ANGEL CORDERO, JR., WILLIAM HERBERT MCCAULEY, PHILIP GROVE and VINCENT BRACCIOLE,

Appellants

—v.—

HAL HANDEL, Executive Director of the New Jersey Racing Commission, SAMUEL A. BOULMETIS, Steward Representing New Jersey Racing Commission, JOSEPH F. PIARULLI, Associate Steward, CARL H. HANFORD, Associate Steward, and RICHARD W. LAWRENSON, Associate Steward

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY—CAMDEN
D.C. Civil No. 85-1700

Present:

ADAMS, GIBBONS and WEIS, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel April 18, 1986.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District

Court entered September 12, 1985, be, and the same is hereby affirmed. Costs taxed against the appellants.

ATTEST:

/s/ SALLY MRVOS
Clerk

July 10, 1986

Certified as a true copy and issued in lieu
of a formal mandate on August 1, 1986.

Test: M. ELIZABETH FERGUSON

Chief Deputy Clerk, United States Court of Appeals,
for the Third Circuit.

Supreme Court, U.S.
FILED
OCT 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-576

In The
Supreme Court of the United States
October Term, 1986

WILLIAM SHOEMAKER, ANGEL CORDERO, JR., WILLIAM HERBERT McCAULEY, PHILIP GROVE, and VINCENT BRACCIALE,

Petitioners,

v.

HAL HANDEL, Executive Director of the New Jersey Racing Commission, SAMUEL A. BOULMETIS, Steward Representing New Jersey Racing Commission, JOSEPH F. PIARULLI, Associate Steward, CARL H. HANFORD, Associate Steward, and RICHARD W. LAWRENSON, Associate Steward,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

	Pages
COUNTERSTATEMENT OF THE CASE	1
ARGUMENT:	8
POINT I. THE THIRD CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT THE NEW JERSEY RACING COMMISSION OVERSEES A HIGHLY REGULATED INDUSTRY WHICH JUSTIFIES THE ADMINISTRATIVE INSPECTION EXCEPTION FOR WARRANTLESS SEARCHES.	8
POINT II. THE DECISION OF THE COURT OF APPEALS IS NOT CONTRARY TO ANY OF THIS COURT'S PRIOR RULINGS NOR IS IT INCONSISTENT WITH ANY RULINGS OF THE OTHER CIRCUITS.	10
POINT III. CERTIORARI SHOULD BE DENIED SINCE THIS CASE DOES NOT RAISE A "SPECIAL AND IMPORTANT REASON" AS CONTEMPLATED BY RULE 17 OF THE SUPREME COURT.	12
CONCLUSION	14

TABLE OF AUTHORITIES

Pages

CASES CITED

Colonnade Catering Corp. v. United States, 397 *U.S.* 72, 90 *S.Ct.* 774, 25 *L.Ed.*2d 60 (1970) 9

Dare v. State, 159 *N.J. Super.* 533, 388 *A.*2d 984 (App. Div. 1978) 8, 9

Delaware v. Prouse, 440 *U.S.* 648, 99 *S.Ct.* 1391, 59 *L.Ed.*2d 660 (1979) 10, 11

Donovan v. Dewey, 452 *U.S.* 594, 101 *S.Ct.* 2534, 69 *L.Ed.*2d 262 (1981) 9

Garifine v. Monmouth Park Jockey Club, 29 *N.J.* 47, 148 *A.*2d 1 (1959) 8

Hunter v. Auger, 672 *F.*2d 668 (8th Cir. 1982) 10, 11, 12

Jersey Downs, Inc. v. Div. of N.J. Racing Comm'n, 102 *N.J. Super.* 451, 246 *A.*2d 146 (App. Div. 1968) 9

Maietta v. New Jersey Racing Commission, 183 *N.J. Super.* 397, 444 *A.*2d 55 (App. Div. 1982) *aff'd*, 93 *N.J.* 1, 459 *A.*2d 295 (1983) 9

New Jersey v. T.L.O., 469 *U.S.* 325, 105 *S.Ct.* 733, 83 *L.Ed.*2d 720 (1985) 10

Schmerber v. California, 384 *U.S.* 757, 86 *S.Ct.* 1826, 16 *L.Ed.*2d 908 (1966) 12

Security and Law Enforcement Employees v. Carey, 737 *F.*2d 187 (2d Cir. 1984) 10, 11

Shoemaker v. Handel, 619 *F. Supp.* 1089 (D.N.J. 1985) 8

Shoemaker v. Handel, 795 *F.*2d 1136 (3rd Cir. 1986) 8

State v. Dolce, 165 *N.J.Super.* 488, 398 *A.*2d 610 (Law Div. 1979), *aff'd* 178 *N.J. Super.* 275, 428 *A.* 2d 947 (App. Div. 1981) 8

State v. Garden State Racing Ass'n, 136 *N.J.L.* 173, 54 *A.*2d 916 (E. & A. 1947) 9

TABLE OF AUTHORITIES—Continued

Pages

United States v. Biswell, 406 *U.S.* 311, 92 *S.Ct.* 1593, 32 *L.Ed.*2d 87 (1972) 9

NEW JERSEY STATUTES CITED

N.J.S.A. 5:5-30 7

N.J.S.A. 24:21-1 *et seq.* 1

NEW JERSEY ADMINISTRATIVE CODES CITED

N.J.A.C. 13:70-14A.10 1

N.J.A.C. 13:70-14A.11 1

N.J.A.C. 13:71-18.1 2

N.J.A.C. 13:71-18.2 2

COUNTERSTATEMENT OF THE CASE

Petitioners', five journeyman jockeys, seek a writ of certiorari to review the constitutionality of the New Jersey Racing Commission's regulations authorizing pre-race breathalyzer and limited, random post-race urine tests for licensed jockeys riding in licensed horse-race meetings within the State of New Jersey. After a four-day trial the regulations were held to be constitutional by the United States District Court (Pa19-Pa60). Thereafter, the Third Circuit Court of Appeals again affirmed the constitutionality of the regulations. 795 *F.*2d 1136 (3d Cir. 1986) (Pa1-Pa18).

New Jersey Racing Commission regulation *N.J.A.C.* 13:70-14A.10 permits the use of breathalyzer tests for officials, jockeys, trainers and grooms and mandates that if any person receives a reading of .05 percent or more, then they shall not be permitted to undertake their assignments. Such a finding also exposes the person to a fine or suspension if the track officials so determine, and a second violation can lead to expulsion. As presently implemented, each jockey receives a breathalyzer test every night before racing. *N.J.A.C.* 13:70-14A.11 prohibits the use by jockeys of any Controlled Dangerous Substance (as defined by statute, in *N.J.S.A.* 24:21-1 *et seq.*) or any prescription legend drug, unless such drug was obtained pursuant to a valid prescription or order from a licensed physician. The regulation authorizes the use of a post-race urine test to determine the use of drugs by a jockey. The first time a jockey is found to have a positive urine test, he receives a written reprimand and is subject to mandatory testing. If a second positive result is obtained,

the jockey must enroll in a treatment program, but is permitted to continue riding unless participation is deemed detrimental to the best interests of racing. A third positive result subjects a jockey to a fine, suspension or expulsion. Pursuant to the regulation, the results of any urine test are kept confidential, except for use with regard to any hearing in connection with a violation of the regulation. As presently implemented, several jockeys are selected at random each evening for urine testing.

Bruce Garland, Deputy Director of the Racing Commission, testified that the regulations at issue were prepared after consultation with the New Jersey Department of Health, New Jersey State Police, horsemen's groups, jockeys' organizations and other groups and took eighteen months to develop and promulgate (Tr. Garland at 37-38). The harness drivers' organization had approached the Racing Commisison to set up similar regulations for their industry, and their comments with regard to the regulations have been "favorable" (Tr. Garland at 40-41).*

Garland testified that the primary purposes of the regulations were safety, protecting the integrity of racing, and the identification and rehabilitation of alcohol and drug abusers (Tr. Garland at 39). He pointed out that the integrity of racing is at issue because of the public's need to be certain that races are honestly run since there is wagering upon the races (Tr. Garland at 39-40). He stated that the public perception of the integrity of racing is undermined since drugs are purchased from people

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* Those regulations, which mirror the regulations with regard to jockeys, are *N.J.A.C.* 13:71-18.1 (breathalyzer) and 13:71-18.2 (urine testing).

connected with the criminal element and such a perception goes to the very foundation of the sport (Tr. Garland at 76). In response to the jockey's position that they can police themselves with regard to alcohol and drug abuse, it was his opinion that the public's perception of the integrity of racing would be enhanced by the Racing Commission, rather than the jockeys themselves, policing the industry (Tr. Garland at 77).

As currently implemented, all results of testing are kept confidential and not turned over to law enforcement authorities (Tr. Garland at 46). In fact, Garland testified that should the Racing Commission be required to supply information to law enforcement authorities, then the program would be discontinued (Tr. Garland at 46).

Between April 1, 1985 and June 1985, the testing program yielded five alcohol positives (four officials and one jockey) and one cocaine positive for a jockey (Tr. Garland at 57-58). Furthermore, in 1984, two jockeys were found in possession of cocaine at a racetrack (Tr. Garland at 84-85).

Samuel Boulmetis, the Chief Racing Commission official for thoroughbred racing and a former jockey, testified on behalf of defendants. Among his responsibilities is implementation of the alcohol and drug testing program at the thoroughbred racetracks (Tr. Boulmetis at 3-4). He was a jockey for nineteen years, a member of the Hall of Fame, president for six years of the Jockeys' Guild, the organization funding this lawsuit, and a racing official since 1967 (Tr. Boulmetis at 5).

He disputed the petitioners' contention that jockeys can police themselves and indicated that due to friendship,

individual jockeys would be reluctant to come forward with information (Tr. Boulmetis at 6-7). He testified that he has seen jockeys drunk or high in the jockeys' room and sometimes that person was permitted to ride (Tr. Boulmetis at 7-8). In his view the problem of alcohol and drug abuse among jockeys has increased since he was riding and has no reason to believe that jockeys would have a lower incidence of alcohol and drug abuse than the general population (Tr. Boulmetis at 7-9).

Boulmetis stated that racing requires a great deal of skill, mostly reflexes, and that even a slight decrease in reflexes would pose an increased danger in racing to both the jockey and other riders (Tr. Boulmetis at 9-10). In his experience there have been a number of serious accidents and deaths in races (Tr. Boulmetis at 9), and a substantial number of accidents could be caused by something other than an injury to a horse, such as carelessness on the part of the jockey (Tr. Boulmetis at 15).

He testified that he has implemented the testing program with flexibility, excusing jockeys who have been unable to provide urine samples (Tr. Boulmetis at 10-11). In his opinion the mandatory alcohol and drug testing program has helped the racing industry by building more confidence among the public and is not degrading to the jockeys (Tr. Boulmetis at 29).

Raymond Deputy, chief harness racing official for the state of Delaware, testified with regard to Delaware's drug testing program which he developed and implemented. That program was requested by the harness horsemen's organization and funded by them (Tr. Deputy at 32). The program uses mandatory random urine test-

ing similar to the New Jersey regulations and also requires each driver to pass a breathalyzer test (Tr. Deputy at 32). In his opinion, the random testing approach, as opposed to the probable cause system advocated by petitioners, acts as a deterrent, and that the probable cause approach would be insufficient by itself (Tr. Deputy at 36). Deputy stated that the testing program in Delaware has yielded five to six positives per year for alcohol and an average of 14.2% positives for drug use (Tr. Deputy at 34).

Dr. Robert Pandina, Scientific Director of the Center of Alcohol Studies and Associate Professor of Psychology at Rutgers University, testified as an expert witness on behalf of defendants. He was qualified as an expert in the development, implementation and evaluation of programs for both the identification and treatment of alcohol and drug abusers (Tr. Pandina at 3-4). In addition to his research and teaching responsibilities, Dr. Pandina serves as a consultant to the Commissioner of Major League Baseball (Tr. Pandina at 5).

It was Dr. Pandina's experience that ball players are reluctant to turn in another player with respect to alcohol and drug use (Tr. Pandina at 21). Thus, the self-policing approach advocated by petitioners could enable a drug user to continue undetected and thus not receive help or rehabilitation (Tr. Pandina at 21-22).

Dr. Pandina described the New Jersey testing program as the most effective approach and one which strikes a reasonable balance amongst the various considerations in drug testing (Tr. Pandina at 45). He concluded that the approach taken by the New Jersey Racing Commission

was conservative, more conscious of a person's rights, less invasive than other approaches which would provide more of a deterrent effect, and a "good" one (Tr. Pandina at 45-46).

Four jockeys testified on behalf of petitioners. They were all experienced, with a range of nine to eighteen years of riding. One of the jockeys testified that he had never observed anyone drunk or high in the jockey's room (Tr. McCauley at 66-67), two jockeys stated that they only saw three or four jockeys drunk or high (Tr. Grove at 82-83; Tr. Black at 109) and one jockey indicated that in fifteen years of riding he observed only five or six jockeys under the influence of alcohol or drugs prior to racing (Tr. Bracciale at 14-15).

Three of the four jockeys agreed that timing and reflexes were very important for a jockey (Tr. Bracciale at 34-35; Tr. Grove at 99; Tr. Black at 120). One jockey testified that any deterioration of reflexes could be hazardous on the racetrack (Tr. Black at 120-121), another indicated that any alcohol on the day of a race would affect a jockey's reflexes (Tr. Bracciale at 36-37), a third indicated that if a jockey was not in control of his senses he would be a danger on a racetrack (Tr. McCauley at 70), and the fourth jockey stated that he would be concerned if anyone rode in a race with his reflexes impaired in any fashion (Tr. Grove at 100). One of the jockeys also indicated that if a jockey was under the influence of alcohol or drugs or unfit to ride there would be "much chance of injury" (Tr. Bracciale at 14).

Each of the four jockeys agreed that riding a horse in a race posed substantial accident risks. Two jockeys stated

that horses travel approximately 40 miles per hour in a race (Tr. Bracciale at 35; Tr. Grove at 99), and three of the jockeys testified than an accident in a race involving one horse and jockey could cause a chain reaction where other horses and jockeys fall down (Tr. McCauley at 69-70; Tr. Grove at 100; Tr. Black at 121).

Regarding the administration of the testing program, one jockey stated that the breathalyzer test does not hurt at all and the urinalysis test does not involve any pain (Tr. Bracciale at 44). Another jockey testified that neither the urine nor the breathalyzer was a painful process (Tr. Black at 123).

Based on the testimony and evidence presented at trial, the District Court made 43 Findings of Fact. Among the more critical findings were:

1. The risk of serious injury in a race is "apparent" and is "greatly increased if a jockey participates while under the influence of alcohol or controlled dangerous substances." Finding of Fact No. 4.

2. The District Court took judicial notice of the fact that alcohol and drug abuse is a serious national problem, and the degree of risk is the same for athletes as the general public. Finding of Fact No. 5.

3. The New Jersey Legislature has enacted strict controls over horse racing and vested the Racing Commission with the broad powers necessary to supervise the industry. *See, e.g., N.J.S.A.* 5:5-30. Finding of Fact No. 11.

4. Oral and written notice of the adoption of the regulations at issue were provided to all persons affected and the Jockey's Guild. Finding of Fact No. 14.

5. The urine test results are kept confidential. Finding of Fact Nos. 27, 32 and 34. [Pa21-Pa31].

The District Court determined that the Racing Commission's drug testing program was constitutional. *Shoemaker v. Handel*, 619 *F. Supp.* 1089 (D.N.J. 1985).

In affirming, the Third Circuit Court of Appeal held, *inter alia*, that these tests are constitutional since they are administrative searches conducted pursuant to the regulation of a closely regulated industry. *Shoemaker v. Handel*, 795 *F.*2d 1136 (3rd Cir. 1986).

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ARGUMENT

POINT I

THE THIRD CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT THE NEW JERSEY RACING COMMISSION OVERSEES A HIGHLY REGULATED INDUSTRY WHICH JUSTIFIES THE ADMINISTRATIVE INSPECTION EXCEPTION FOR WARRANTLESS SEARCHES.

There can be no doubt that the New Jersey horse racing industry is highly regulated and that the state has a strong interest in the integrity of same. Such stringent regulation is essential because of the danger of clandestine and dishonest activity inherent in the business of horse racing. *Garifine v. Monmouth Park Jockey Club*, 29 *N.J.* 47, 148 *A.*2d 1 (1959); *State v. Dolce*, 165 *N.J. Super.* 488, 398 *A.*2d 610 (Law Div. 1979), *aff'd* 178 *N.J. Super.* 275, 428 *A.*2d 947 (App. Div. 1981); *Dare v. State*, 159 *N.J.*

Super. 533, 388 *A.*2d 984 (App. Div. 1978). As has been said by our courts, the horse racing industry itself and the legalized gambling which accompany its activities are strongly affected by a public interest. *Maietta v. New Jersey Racing Commission,* 183 *N.J. Super.* 397, 444 *A.*2d 55 (App. Div. 1982), *aff'd,* 93 *N.J.* 1, 459 *A.*2d 295 (1983); *Dare v. State, supra; State v. Garden State Racing Ass'n,* 136 *N.J.L.* 173, 54 *A.*2d 916 (E. & A. 1947). Corruption in horse racing activities is regarded as an affront to a publicly sponsored sport with the potential of far reaching consequences. *Dare v. State, supra; Jersey Downs, Inc. v. Div. of N.J. Racing Comm'n,* 102 *N.J. Super.* 451, 246 *A.*2d 146 (App. Div. 1968).

It is well settled that in regulating such industries, warrantless searches are entirely appropriate. *Donovan v. Dewey,* 452 *U.S.* 594, 101 *S.Ct.* 2534, 69 *L.Ed.*2d 262, (1981) (coal mines); *United States v. Biswell,* 406 *U.S.* 311, 92 *S.Ct.* 1593, 32 *L.Ed.*2d 87 (1972) (sale of guns); *Colonnade Catering Corp. v. United States,* 397 *U.S.* 72, 90 *S.Ct.* 774, 25 *L.Ed.*2d 60 (1970) (liquor industry). It was on this basis that the Third Circuit Court of Appeals sustained the constitutionality of the Racing Commission's regulations.

As such, the challenged regulation is an appropriate and constitutional exercise of the Racing Commission's charge to be a vigilant watchdog for the public in the regulation of horse racing due to its susceptibility to clandestine activity.

POINT II

THE DECISION OF THE COURT OF APPEALS IS NOT CONTRARY TO ANY OF THIS COURT'S PRIOR RULINGS NOR IS IT INCONSISTENT WITH ANY RULINGS OF THE OTHER CIRCUITS.

In urging this Court to grant a writ of *certiorari*, petitioners contend that the result below is contrary to this Court's decisions in *New Jersey v. T.L.O.*, 469 *U.S.* 325, 105 *S.Ct.* 733, 83 *L.Ed.*2d 720 (1985) and *Delaware v. Prouse*, 440 *U.S.* 648, 99 *S.Ct.* 1391, 59 *L.Ed.*2d 660 (1979) and contrary to decisions of the Courts of Appeals for the Second and Eighth Circuits in *Security and Law Enforcement Employees v. Carey*, 737 *F.*2d 187 (2d Cir. 1984) and *Hunter v. Auger*, 672 *F.*2d 668 (8th Cir. 1982). This argument is without merit, and therefore, *certiorari* should not be granted.

Indeed, in the main case relied upon by petitioners, *New Jersey v. T.L.O.*, this Court *upheld* a search of a student's purse by a school official. Certainly, the case contains dicta that searches must generally be reasonable. However, the Racing Commission has never taken the position that all searches, of all persons, at any time, for any reason are constitutional. *New Jersey v. T.L.O.* is simply not on point regarding the issue of the propriety of limited drug testing for a few, certain individuals involved in a highly regulated and physically dangerous business.

Delaware v. Prouse is easily distinguishable from the case at bar. A patrolman, acting without standards, guidelines or procedures promulgated by either the state or municipality pulled over an automobile on a whim, 440

U.S. 650-651. Thereafter marijuana that was discovered was ordered suppressed by this Court. Contrast the *Delaware* facts with those at hand. The universe of people subject to search is smaller; there are standards, guidelines and procedures to be followed and there are rational bases for the test, *i.e.* safety of the participants in a horse race and the integrity of the horse racing industry. This factual situation is wholly dissimilar to a patrolman who had noticed no suspicious activity stopping a vehicle because "I saw the car in the area and wasn't answering any complaints, so I decided to pull them off." 440 *U.S.* 650-651.

Similarly, neither the *Security and Law Enforcement Employees* case nor the *Hunter* case offer any solace to petitioners. The cases are similar in that they involve strip searches including visual examination of the anal and genital area of the person being searched, these persons being prison guards (*Security*) and prison visitors (*Hunter*). These courts were particularly concerned with the extreme intrusion of such a search. As stated in the *Security* court:

> The Supreme Court in *Bell v. Wolfish*, a case that involved visual body-cavity searches of pretrial detainees, noted that "this practice instinctively gives us the most pause." 441 *U.S.* at 558, 99 *S.Ct.* at 1884. Further, Justice Marshall's dissent in *Bell* observed that the visual body-cavity searches "represent one of the most grievous offenses against personal dignity and common decency." *Id.* at 576-77, 99 *S.Ct.* at 1893. Justice Stevens, in his dissent, expressed the same view when he stated that visual body-cavity searches "— clearly the greatest personal indignity — may be the least justifiable measure of all." *Id.* at

> 594, 99 *S.Ct.* at 1903 (Brennan, J., joining). [737 *F.*2d 187].

The *Hunter* court held:

> Indeed, a strip search, regardless how professionally and courteously conducted, is an embarrassing and humiliating experience [672 *F.*2d 674].

The petitioners cannot reasonably argue to the court that there is any true comparison, on an intrusiveness basis, between the Racing Commission's tests and a body-cavity search. In the case at bar, the District Court made the proper distinction.

> Likewise, the intrusiveness of the search must also be considered. While the Supreme Court has refrained from drawing bright lines among searches, breathalyzer tests and urinalysis are considered less intrusive than body cavity and strip searches. *See Schmerber,** supra; *United States v. Ramsey,* 431 *U.S.* 606, 618 n.1 (1976); *United States v. Des Jardins,* 747 *F.*2d 499, 504-05 (9th Cir. 1984). [Pa39].

Since the case at bar is not in conflict with previous decisions of this Court and the circuits, *certiorari* should be denied.

POINT III

CERTIORARI SHOULD BE DENIED SINCE THIS CASE DOES NOT RAISE A "SPECIAL AND IMPORTANT REASON" AS CONTEMPLATED BY RULE 17 OF THE SUPREME COURT.

Petitioners urge that the national problem of drug abuse warrants review of the case at bar (Pb27-30). How-

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* *Schmerber v. California,* 384 *U.S.* 757, 86 *S.Ct.* 1826, 16 *L.Ed.* 2d 908 (1966).

ever this is not a case of national importance. It does not involve drug testing of hundreds of thousands of persons such as military personnel, police officers, firemen, teachers or all federal employees (Pb27). To the contrary, this care involves few persons *i.e.*, only those persons who ride as jockeys in thoroughbred races in the State of New Jersey.

More importantly, the opinion of the Court of Appeals is extremely narrow, both in terms of tests allowed and individuals affected. As the Court said:

> Our holding applies only to breathalyzer and urine sampling of voluntary participants in a highly-regulated industry. Thus it should not be read as dispositive of the distinct issue presented in testing of children subject to mandatory school attendance laws or the testing of motor vehicle drivers. [Pa14, footnote 5].

The petition for writ of certiorari plainly does not raise a question of constitutional dimension which would warrant the granting of such extraordinary relief.

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CONCLUSION

For the aforementioned reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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